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Order F15-26

MINISTRY OF ENVIRONMENT

Elizabeth Barker
Senior Adjudicator

June 18, 2015

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Summary: The applicant requested the Ministry provide records related to his landfill operation. The Ministry refused to disclose some information under s. 3(1)(h) (outside scope of Act), s. 13 (policy advice or recommendations), s. 14 (solicitor client privilege), s. 15 (harm to law enforcement), and s. 22 (harm to personal privacy) of FIPPA. The adjudicator found that s. 3(1)(h) did not apply and the records were within the scope of FIPPA. The adjudicator also found that most of the information withheld under ss. 13, 14 and 22, and all of the information withheld under ss. 15(1)(d) and (l), was appropriately withheld under those exceptions. The Ministry also severed information from the records on the basis that the information was "not responsive" to the applicant's request. The adjudicator held that FIPPA does not authorize refusing to disclose information on that basis.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(h), 4, 13, 14, 15(1)(d), 15(1)(l) and 22; *Crown Counsel Act*.

Authorities Considered: B.C.: Order No. 20-1994, 1994 CanLII 606 (BC IPC); Order 170-1997, 1997 CanLII 1485 (BCIPC); Order No 256-1998, 1998 CanLII 2682 (BC IPC); Order 00-18, 2000 CanLII 7416 (BC IPC); Order 01-15, 2001 CanLII 21569 (BC IPC); Order 01-53, 2001 CanLII 21607 (BC IPC); Order 02-14, 2002 CanLII 42439 (BC IPC); Order 02-38, 2002 CanLII 42472 (BCIPC); Order 03-14, 2003 CanLII 49183 (BC IPC); Order 03-37, 2003 CanLII 49216 (BC IPC); Order 05-26, 2005 CanLII 30676 (BC IPC); Order F06-16, 2006 CanLII 25576 (BCIPC); Order F08-03, 2008 CanLII 13321 (BC IPC); Order F10-15, 2010 BCIPC 24 (CanLII); Order F11-17, 2011 BCIPC 23 (CanLII); Order F13-10, 2013 BCIPC 11 (CanLII); Order F13-23, 2013 BCIPC 30 (CanLII); Order F14-44, 2014 BCIPC 47 (CanLII); OIPC Decision, March 28, 2003; Decision F06-04, 2006

CanLII 13533 (BC IPC); Decision F07-01, 2007 CanLII 2527 (BC IPC); Decision F07-02, 2007 CanLII 2529 (BC IPC); Decision F07-04., 2007 CanLII 9595 (BC IPC); Decision F10-14, 2010 BCIPC 23 (CanLII); F15-23, 2015 BCIPC 25, F15-24, 2015 BCIPC 26. **Ont.:** Order P-207,1990 CanLII 3886 (ON IPC).

Cases Considered: *Skogman v. The Queen*, 1984 CanLII 22 (SCC), p. 109; *Krieger v. Law Society of Alberta, 2002 SCC 65; R. v. Regan*, 2002 SCC 12; *British Columbia (Attorney General) v. Davies, 2009 BCCA 337; R. v. Campbell,* 1999 CanLII 676 (SCC);*John Doe v. Ontario (Finance*), 2014 SCC 36; *R. v. B., 1995 Can LII 2007* (BCSC); *Canada v. Solosky* , 1979 CanLII 9 (SCC); *Hoogers v. Canada (Minister of Communications)*, [1998] F.C.J. No. 834; *Canada (Information Commissioner) v. Canada (Minister of Natural Resources),* 2014 FC 917; *College of Physicians of B.C. v. British Columbia,* 2002 BCCA 665 (CanLII);*Rizzo & Rizzo Shoes Ltd. (Re)*,1998 CanLII 837 (SCC); *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 (CanLII); Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3 (CanLII); *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII).

INTRODUCTION

[1] This inquiry involves a request for records related to the Ministry's involvement with a landfill operation in Kamloops. The applicant asked the Ministry of Environment ("Ministry") to provide copies of records created between January 2009 to October 2012 containing information about himself, his company and his company's landfill operations.

[2] The Ministry disclosed some information from the responsive records but informed the applicant that it was withholding other information under s. 3(1)(h) (outside scope of Act), s. 13 (policy advice or recommendations), s. 14 (solicitor client privilege), s. 15 (harm to law enforcement), s. 16 (harm to intergovernmental relations or negotiations), s. 17 (harm to public body's financial or economic interests) and s. 22 (harm to personal privacy) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The applicant asked the Office of the Information and Privacy Commissioner ("OIPC") to review the Ministry's decision. Mediation did not resolve the matter and the applicant requested that it proceed to inquiry. During the inquiry, the Ministry reconsidered the application of ss. 16 and 17 to the records, and it is no longer relying on those two exceptions to refuse access.

[3] Before the inquiry closed, the Ministry requested a preliminary hearing into whether the operative time for determining whether s. 3(1)(h) applies is the time of the Ministry's response to the requests or the time of the inquiry. The OIPC declined to deal with that issue in a preliminary way in advance of this inquiry. It will be addressed below.

[4] Finally, although not identified as an issue in the Investigator's Fact Report or the Notice of Inquiry, the Ministry is withholding portions of some of the records as "non-responsive". I invited the parties to provide a submission on the issue of whether the Ministry is authorized under FIPPA to refuse to disclose part of a responsive record because that part is non-responsive or outside the scope of the access request. Only the Ministry provided a submission on this point.

ISSUES

1. Do some of the records fall outside the scope of FIPPA, pursuant to s. 3(1)(h)?
2. Is the Ministry authorized to refuse access to information in the requested records under ss. 13, 14, 15(1)(d) and 15(1)(l) of FIPPA?
3. Is the Ministry required to refuse access to information in the requested records under s. 22(1) of FIPPA?
4. Is the Ministry authorized under FIPPA to refuse to disclose information in a record because that information is "not responsive" or "out of scope" of the access request?

[5] Section 57 of FIPPA establishes the burden of proof in an inquiry. When access to information has been refused under ss. 13, 14 and 15, it is up to the public body to prove that the applicant has no right of access to the records or parts of the records. However, for information withheld under s. 22 of FIPPA, s. 57(2) of FIPPA places the burden on the applicant to establish that disclosure of personal information contained in the requested records would not unreasonably invade third party personal privacy. Although s. 57 is silent regarding the burden of proof in cases involving s. 3(1), previous Orders have established that the public body bears the burden of establishing that the records are excluded from the scope of FIPPA.[1]

DISCUSSION

[6] **Background -** The applicant is the principal of Valleyview Enterprises Ltd. ("Valleyview"), which operates a landfill in Kamloops. In 2010, the applicant and Valleyview were convicted in the BC Provincial Court of offences under the *Environmental Management Act*[2] and ordered to pay fines. The applicant and

[1] For example: Order 170-1997, 1997 CanLII 1485 (BCIPC); Order 03-14, 2003 CanLII 49183 (BC IPC); Order F13-23, 2013 BCIPC 30 (CanLII).
[2] [RSBC 2003] c. 53.

Valleyview appealed to the BC Supreme Court and then the BC Court of Appeal. The Court of Appeal overturned part of their sentences but not their convictions.[3]

[7] In the fall of 2012, the applicant made four requests[4] for records that mention or relate to the applicant, Valleyview and the landfill, specifically:

1. Contracts and agreements between the Ministry and an engineering consultant and his firm for the time period January 1, 2009 to August 9, 2012.
2. Meeting minutes and all written communications between a named Ministry employee and City of Kamloops officials for the time period January 1, 2009 to August 9, 2012.
3. Complaints, responses and investigation results for 2005 to 2012.
4. Diary notes of two named Ministry employees.
5. Communications to or from a named Ministry employee for the time period January 1, 2011 to October 2, 2012.

[8] **Information at issue –** There are approximately 1500 pages of responsive records, many of which have been disclosed to the applicant. The Ministry is withholding relatively small parts of the balance of the records. The information in dispute is in emails, letters, documents prepared by Ministry staff for their Minister (i.e., decision notes, Minister's information notes and meeting information notes), minutes of the annual general meeting of the Valleyview Community Association, and handwritten entries in an Environmental Protection Officer's work diary.

Scope of Act - s. 3(1)(h)

[9] The Ministry submits that s. 3(1)(h) applies to some of the disputed records, so they are excluded from the scope of FIPPA. Section 3(1)(h) states as follows:

> 3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
>
> …
>
> (h) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;
>
> …

[3] R. v. Ambrosi & Valleyview Ent. Ltd. 2010 BCPC 460 (CanLII); R. v. Ambrosi, 2011 BCPC 452; R. v. Ambrosi, 2012 BCSC 409 (CanLII); R. v. Ambrosi, 2014 BCCA 325 (CanLII).
[4] August 9, August 17, September 28 and October 2, 2012.

[10] The following definition in Schedule 1 of FIPPA is also relevant to this issue:

> "prosecution" means the prosecution of an offence under an enactment of British Columbia or Canada;

[11] A number of BC Orders have considered the application of s. 3(1)(h) and stated that its purpose is to allow prosecutions to proceed without interference by insulating Crown counsel from requests for access under FIPPA until such time as the prosecutions are complete.[5] In Order 05-26, former Commissioner Loukidelis said the following about the application of s. 3(1)(h):

> Section 3(1)(h) will apply to records only if there is a "prosecution" as defined in the Act, the records in question are records "relating to" the prosecution, and "all proceedings in respect of the prosecution have not been completed". This last element of s. 3(1)(h) effectively places a time limit on that provision's exclusion of records from the right of access under the Act. Once all proceedings "in respect of" the prosecution are over—for example, where all appeal periods have expired—the Act will apply. The Act's application does not mean, of course, that an access applicant will receive all records, since one or more of the Act's exceptions to the right of access may apply to some or even all of the information in the records.[6]

Parties' Submissions – s. 3(1)(h)

[12] The Ministry submits that when it responded to the applicant's access requests on April 2 and June 5, 2013, the applicant and Valleyview were being prosecuted for offences under British Columbia's *Environmental Management Act*. A Crown counsel from the Ministry of Justice's Criminal Justice Branch was conducting the prosecution. The Ministry submits that this is a "prosecution" for the purposes of s. 3(1)(h), and that the records withheld under s. 3(1)(h) clearly relate to that prosecution. The Ministry says that the August 14, 2014 BC Court of Appeal decision on the matter marked the completion of the prosecution.

[13] The Ministry explains that even though it could have withheld some of the records in their entirety under s. 3(1)(h), in order to be consistent with the purposes of FIPPA and be more accountable to the public, it chose to only redact the portions of those records that pertained to the prosecution.

[14] The applicant does not dispute that there was a prosecution and that the matter was last dealt with by the BC Court of Appeal in August 2014. He asserts, however, that the prosecution in his case was over as of March 21, 2012, when the BC Supreme Court made its decision. He submits that his sentencing appeal before the BC Court of Appeal does not meet the definition of "prosecution" in

[5] Order No. 20-1994, 1994 CanLII 606 (BC IPC); Order No 256-1998, 1998 CanLII 2682 (BCIPC).
[6] Order 05-26, 2005 CanLII 30676 (BC IPC), at para. 54.

FIPPA. The applicant also doubts that the records in dispute even relate to the prosecution.

Analysis - s. 3(1)(h)

[15] I am satisfied that the legal action taken against the applicant and Valleyview under the *Environmental Management Act* meets the definition of "prosecution" in FIPPA. Crown counsel conducted the prosecution in which the applicant and Valleyview were convicted of two offences each and sentenced by the BC Provincial Court. I have reviewed the records to which the Ministry applied s. 3(1)(h), and I find that the information withheld under s. 3(1)(h) clearly relates to that prosecution.

[16] I agree with the Ministry that at the time of the Ministry's responses to the access requests, the prosecution was not yet completed. In my view, the prosecution was not completed until all challenges to the convictions and sentences were decided by the BC Court of Appeal on August 14, 2014.[7] This date is after the Ministry responded to the applicant's requests on April 2 and June 5, 2013, but before this inquiry, which concluded on January 29, 2015.

[17] The Ministry submits that the operative time for assessing whether s. 3(1)(h) applies (and the other FIPPA exceptions it used to sever the records) should be the date of the Ministry's *response* to the access requests – not the date of the inquiry.[8] It references three cases, which it says state that the date of the response to the access request is the relevant point in time to determine if a public body has appropriately invoked the exceptions under FIPPA.[9] While those three cases refer to the importance of considering the circumstances at the time of the response to an access request, they do not suggest that a review of a public body's decision to refuse access to records under the provisions of s. 3(1)(h) (or any other grounds, for that matter) is restricted to considering only the circumstances at that point in time.

[18] In my view, the question that I must resolve here is whether s. 3(1)(h) *applies* and the records *fall* outside the scope of FIPPA. The OIPC's *Notice of Inquiry* used the present tense to describe the issues at inquiry relating to s. 3(1)(h). The *Notice of Inquiry* does not restrict the issues to be examined to only the circumstances as they existed when the Ministry responded to the access requests in April and June 2013.

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[7] I have no evidence to suggest that leave to appeal to the Supreme Court of Canada was sought.

[8] Ministry's initial submissions, para. 4.13.

[9] *Hoogers v. Canada (Minister of Communications)*, [1998] F.C.J. No. 834; *Canada (Information Commissioner) v. Canada (Minister of Natural Resources),* 2014 FC 917; Order 02-14, 2002 CanLII 42439 (BC IPC).

[19] When considering the applicability of the exceptions to disclosure, it is important to give full weight to the purposes of FIPPA which include facilitating the right of access subject only to limited and specific exceptions. To find at an inquiry that a public body is authorized or required to withhold information on the basis of circumstances that no longer exist when the public body prepared its submissions and evidence for inquiry is inconsistent with the purposes of FIPPA.

[20] Former Commissioner Loukidelis addressed this same point about changing circumstances and the impact on s. 3(1)(h) in a March 28, 2003 decision.[10] In that case the Ministry of Attorney General relied on s. 3(1)(h) to refuse access to records related to the billings of publicly funded lawyers acting for Inderjit Singh Reyat, one of three individuals accused of the bombing of Air India Flight 182. Several weeks before the Commissioner's decision, Mr. Reyat pled guilty to a single count, was sentenced for that offence, and all other charges against him were stayed. The Commissioner found that this completed the prosecution. He wrote:

> In conducting an inquiry under Part 5 of the Act, I am not limited to considering only information that existed, was known to or was relied upon by the access applicant when he made his request or by the public body when it responded to the access request. The applicant has requested a review of the Ministry's response to his access request. Again, that response did not raise s. 3(1)(h), but the Ministry put it in issue at the time of the inquiry. The s. 3(1)(h) issue needs to be decided and the intervening resolution of all charges against Reyat is relevant to that decision. Rather than confining my ruling on the s. 3(1)(h) issue to circumstances that have become academic, this inquiry calls out for a ruling on the applicability of s. 3(1)(h) to these records in the present circumstances. That is what governs whether the requested records are currently within the scope of the Act and what matters to the access applicant. There is also no unfairness to the Ministry in proceeding in this way.[11]

[21] In this case, I find that when the Ministry responded to the access requests, the prosecution of the applicant and Valleyview was clearly not yet complete, so s. 3(1)(h) applied to the records at that time. However, that is not the end of the matter. Circumstances changed between the date of the response to the access request and when the Ministry prepared its inquiry submissions. The prosecution was completed approximately two months before the OIPC issued its *Investigator's Fact Report* and the *Notice of Inquiry* on October 23, 2014, and five months before the inquiry submissions were due.[12] The purpose of s. 3(1)(h), which is to ensure that prosecutions can proceed without interference from FIPPA access requests, had already been fulfilled as of the

[10] Available at https://www.oipc.bc.ca/decisions/141.
[11] March 28, 2003 Decision, p. 15.
[12] The parties' initial and reply inquiry submissions were due on January 8 and 27, 2015 respectively.

date of this inquiry, so the basis for withholding the information under s. 3(1)(h) no longer existed. In conclusion, I find that the Ministry has not proven that s. 3(1)(h) applies to the records or parts of the records at issue because the prosecution to which the records relate was complete before this written inquiry closed.

[22] In most instances where the Ministry applied s. 3(1)(h) to the records, it also claimed ss. 13, 14 and 22 apply. I will consider the Ministry's application of those exceptions below.

Policy Advice or Recommendations - s. 13

[23] Section 13(1) states that 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.

[24] Section 13(1) has been the subject of many orders that have consistently held that the purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny.[13] In *John Doe v. Ontario (Finance*), the Supreme Court of Canada addressed Ontario's equivalent of s. 13 and said:

> Political neutrality, both actual and perceived, is an essential feature of the civil service in Canada... The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.[14]

[25] BC orders have also found that s. 13(1) 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.[15]

[26] In *College of Physicians of B.C. v. British Columbia* the British Columbia Court of Appeal said that "advice" includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact, including expert

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[13] For example, Order 01-15, 2001 CanLII 21569 (BC IPC) and Order F11-17, 2011 BCIPC 23 (CanLII).
[14] 2014 SCC 36, at para. 45.
[15] Order F10-15, 2010 BCIPC 24 (CanLII); Order 02-38, 2002 CanLII 42472 (BCIPC); Order F06-16, 2006 CanLII 25576 (BCIPC).

opinions on matters of fact on which a public body must make a decision for future action.[16] Further, in *John Doe v. Ministry of Finance,* the Supreme Court of Canada determined that the word "advice" in s. 13(1) of the Ontario FIPPA includes policy options, whether or not the advice is communicated to anyone.

[27] The process for determining whether s. 13(1) applies to information involves two stages. The first is to determine whether the disclosure of the information would reveal advice or recommendations developed by or for the public body. If it does, it is necessary to consider whether the information falls within any of the categories listed in s. 13(2). The effect of s. 13(2) is that, even in cases where information would reveal advice or recommendations developed by or for a public body, the public body may not withhold the information if it falls within any of the s. 13(2) categories.

Parties' submissions – s. 13

[28] The Ministry submits that the information withheld under s. 13 was developed by Ministry staff for the purpose of providing advice and recommendations to the Minister and senior Ministry staff. The Ministry explains that the information consists of staff opinions, which required an exercise of their judgement and skill to weigh the significance of matters of fact and policy. It also submits that the information includes recommendations and advice, policy implications, options and considerations. The applicant submits that s. 13 cannot apply because there are no outstanding decisions regarding the matters to which the s. 13 information relates. He also submits that s.13 does not apply because, in his view, much of the information is opinions or discussions.

Analysis – s. 13

[29] I have reviewed the information withheld under s. 13, and with one exception, I find that this information was properly withheld under s. 13. That is because it either directly reveals, or would allow one to draw accurate inferences about, advice or recommendations provided by Ministry staff to each other, the Minister and to Crown Counsel. For example, some of the information withheld under s. 13 is in Minister's information notes and decision notes and they describe options and staff recommendations on how to proceed on various issues. In other instances, the information withheld under s. 13 is the opinion of Ministry environmental protection staff on landfill technology and management issues that required an exercise of professional expertise and judgment to determine the significance of various facts. I also find that s. 13 applies to advice

[16] 2002 BCCA 665 (CanLII) at para. 113.

and editing suggestions regarding how to revise and word a Minister's information note.[17]

[30] I have considered whether the information to which s. 13(1) applies falls into any of the categories in s. 13(2), and I find that it does not. Therefore, the Ministry is authorized to refuse to disclose this information under s. 13(1).

[31] However, I find that there is one partial sentence withheld under s. 13, which merely describes the work related activities of Ministry staff.[18] It does not directly or indirectly reveal advice or recommendations, so s. 13(1) does not apply and it may not be withheld under that exception.

Solicitor client privilege - s. 14

[32] Section 14 of FIPPA states that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege. The law is well established that s.14 of FIPPA encompasses both types of solicitor client privilege found at common law: legal professional privilege (sometimes referred to as legal advice privilege) and litigation privilege.[19] The Ministry submits that legal advice privilege applies to the information that it withheld under s. 14.[20] The applicant submits that the records do not contain communications that meet the criteria for either type of solicitor client privilege.

[33] For legal advice privilege to apply the following conditions must be satisfied:

1. there must be a communication, whether oral or written;
2. the communication must be confidential;
3. the communication must be between a client (or agent) and a legal advisor; and

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[17] Part 3, pp. 164-166. Previous orders have recognized that editorial advice and recommendations regarding the content and wording of documents can be withheld under s. 13(1). See: Order F14-44, 2014 BCIPC 47; Order 03-37, 2003 CanLII 49216 (BC IPC).

[18] At Part 2, p. 5 and repeated at Part 3, pp. 175, 181, 187. I have highlighted this information in a copy of the records that will be sent to the Ministry.

[19] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 (CanLII), para. 26.

[20] The Ministry did not rely on litigation privilege, which applies only in the context of litigation itself and ends once the litigation has concluded (*Blank v. Canada (Minister of Justice),* 2006 SCC 39 (CanLII), paras. 34-41). Litigation privilege may be relied upon to protect the work of Crown counsel in the course of a prosecution (*British Columbia (Attorney General) v. Davies*, 2009 BCCA 337 (CanLII), para. 108). However, as the prosecution to which the records relate has concluded, and there is nothing to suggest that the records relate to any other legal proceedings, litigation privilege would not apply even if it had been claimed by the Ministry.

4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

[34] Not every communication between client and solicitor is protected by solicitor client privilege, but if the four conditions above are satisfied, then privilege applies to the communications and the records relating to it.[21] The above criteria have consistently been applied in BC Orders,[22] and I will take the same approach here.

Party's submissions

[35] The Ministry submits that the information it withheld under s. 14 is confidential written communications[23] between Her Majesty the Queen in Right of the Province of British Columbia ("Province"), as the client, and lawyers working at the Ministry of Justice's Legal Services Branch ("LSB") as well as Crown counsel working with the Ministry of Justice's Criminal Justice Branch.

[36] The Ministry submits that the communications between Ministry staff, on behalf of the Province, and LSB lawyers relate to the seeking and giving of legal advice. It adds that some of the records withheld under s. 14 include attachments to emails between the client and legal counsel and those attachments are also subject to solicitor client privilege.

[37] The Ministry also submits that s.14 applies to communications between Ministry staff and the Crown counsel who had conduct of the prosecution.[24]

The applicant denies that privilege applies to the records at issue. He submits: "If there is a client, and that client is HMTQ [Her Majesty the Queen in Right of British Columbia], then legal advice privilege would only apply between a lawyer (DOJ, Crown Counsel) and an official of HMTQ. Communications between two (2) officials of HMTQ would not fall under the ambit of this privilege…"[25]

Analysis – s. 14

[38] In order to establish that solicitor client privilege applies, the communication must be between a client (or the client's agent) and a legal

[21] For a statement of these principles see also *R. v. B., 1995 Can LII 2007* (BCSC), para. 22 and *Canada v. Solosky*, 1979 CanLII 9 (SCC), p. 13.
[22] See: Order 01-53, 2001 CanLII 21607 (BC IPC) and Order F13-10, 2013 BCIPC 11 (CanLII).
[23] The communications are all emails.
[24] The Ministry states that where it has applied both ss. 3(1)(h) and 14 to the records, its position is that "the Act does not apply to such information, and even if it did, such information would be protected under s. 14 of the Act." Ministry's initial submissions, para. 4.56. The Ministry's table of records identifies where information is withheld under both ss. 3(1)(h) and 14.
[25] Applicant's submission, para. 57.

advisor. The Ministry's position is that the relationship between itself and the lawyers who are identified in the responsive records was that of client and legal advisor. The Ministry identified three LSB lawyers and two Crown counsel who took part in the email exchanges with Ministry staff.

[39] The Ministry's submissions identify that the relationship the Ministry has with LSB lawyers differs from its relationship with Crown counsel. The Ministry explains that LSB lawyers provide advice to Ministry employees on a variety of matters, and Ministry employees provide instructions to its LSB lawyers. However, the Ministry says that Crown counsel only provides legal advice to the Ministry about what needs to be proven with respect to a prosecution, and that Ministry employees do not instruct Crown counsel.[26]

[40] It is clear from my review of the communications between the Ministry staff and the LSB lawyers that the LSB lawyers were in a solicitor client relationship with the Ministry. Their communications are directly related to seeking, formulating, and giving legal advice, and there is nothing to suggest that the communications were not kept confidential. Therefore, I find that this information is subject to solicitor client privilege and may be withheld under s. 14.

[41] However, the relationship between the Ministry and Crown counsel requires further examination to determine if Crown counsel was acting in the role of a "legal advisor" when communicating with Ministry staff.

[42] The *Crown Counsel Act*,[27] ("CCA") sets out the functions and responsibilities of Crown counsel and how they are to receive instructions. The Ministry of Justice's Criminal Justice Branch approves and conducts, on behalf of the Crown, all prosecutions of offences in British Columbia and advises the government on all criminal law matters (s.2). The Assistant Deputy Attorney General, Criminal Justice Branch, ("ADAG") may designate as Crown counsel any individual or class of individual who is lawfully entitled to practise law in British Columbia, and each Crown counsel is authorized to represent the Crown before all courts in relation to the prosecution of offences (s. 4). Subject to the directions of the ADAG or another Crown counsel designated by the ADAG, each Crown counsel is authorized to conduct the prosecutions approved (s. 4). If the Attorney General or Deputy Attorney General gives the ADAG a direction with respect to the approval or conduct of any specific prosecution or appeal, that direction must be given in writing to the ADAG, and published in the Gazette (s. 5).

[43] In conducting prosecutions, the Attorney General, as represented by Crown counsel, is in a different position from the ordinary litigant because the

[26] Ministry's initial submissions, para 4.61.
[27] [RSBC 1996], c. 87.

Attorney General represents the public interest of the community at large.[28] Numerous cases have spoken of the fundamental duty of Crown counsel to respect their obligations to be independent from those who may have an interest in the prosecution and how important this is to the proper operation of the rule of law. For example, in *Krieger v. Law Society of Alberta*, the Supreme Court of Canada said the following:

> The gravity of the power to bring, manage and terminate prosecutions which lies at the heart of the Attorney General's role has given rise to an expectation that he or she will be in this respect fully independent from the political pressures of the government… It is a constitutional principle that the Attorneys General of this country must act independently of partisan concerns when exercising their delegated sovereign authority to initiate, continue or terminate prosecutions.[29]

[44] In support of its submission that communications between the Ministry and Crown counsel are protected by privilege, the Ministry cites *R. v. Campbell*.[30] In that case, a senior lawyer with the federal Department of Justice provided advice to an RCMP officer regarding the legality of conducting a reverse sting operation involving undercover officers posing as drug dealers. The SCC found that the RCMP officer need not be an agent of the Attorney General before a solicitor client relationship could exist, and that the communications were protected by solicitor client privilege. The facts of *R. v. Campbell* differ somewhat from those before me because the lawyer who provided the advice in *R. v. Campbell* was not the same Crown counsel who prosecuted the individuals arrested as a result of the sting.

[45] Based on the content and context of the communications I find that, with only a few exceptions discussed below, the communications between the Ministry and Criminal Justice Branch's Crown counsel are between the Crown/Province as the client and its legal advisors. Section 2 of the CCA states that the Criminal Justice Branch approves and conducts, on behalf of the Crown, all prosecutions of offences in BC as well as advises the government on all criminal law matters, and the communications in this case are about such matters. Crown counsel is asked for, and offers, advice regarding evidence, questions of law and court procedures related to the prosecution under the *Environmental Management Act*. In addition, according to the email addresses of the individuals involved, the emails were only shared between Ministry staff, Crown counsel, and the Ministry's LSB lawyers, and there is nothing to suggest that they did not remain confidential. Therefore, I find that the majority of the communications with Crown counsel are protected by solicitor client privilege and may be withheld under s. 14.

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[28] *Skogman v. The Queen*, 1984 CanLII 22 (SCC), p. 109.
[29] *Krieger v. Law Society of Alberta, 2002 SCC 65, para. 29-30.* See also, *R. v. Regan*, 2002 SCC 12, para. 156-157; *British Columbia (Attorney General) v. Davies, 2009 BCCA 337.*
[30] 1999 CanLII 676 (SCC).

[46] However, not all of the records to which s. 14 was applied are communications related to the seeking, formulating, or giving of legal advice. The information that I find does not meet the criteria for solicitor client privilege, so may not be withheld under s. 14, is as follows:

a. Information in a Ministry Decision Note, which is a communication between Ministry staff and the Ministry. The record is not a communication with lawyers and the severed information does not directly or indirectly reveal legal advice. However, it does reveal advice under s. 13 and I found that it may be withheld on that basis. [Part 2, page 6, repeated at page 12].

b. An email between two Crown counsel, copied to Ministry staff, which has already been disclosed at Part 3, page 143. It relates to what the judge said in court and attaches the judge's written reasons. [Part 2, page 13].

c. An email and attachment between Ministry staff but not lawyers. It refers to information that is part of the public court record and is clearly known to the applicant. It does not directly or indirectly reveal legal advice. [Part 3, pages 12-14].

d. An email from a Ministry employee to Crown counsel, which has been withheld in its entirety although all but one paragraph has already been disclosed at Part 2, page 1. The only part of this record that may be withheld under s. 14 is the one paragraph withheld at part 2, page 1. [Part 3, pages 200-01].

e. A one sentence email from a Ministry employee to another Ministry employee and a LSB lawyer forwarding a public record. It contains no reference to legal advice sought or given, nor would it allow accurate inferences about such matters. [Part 3, pages 267-68].

f. An email from Crown counsel to Ministry staff. The email's attachment, which is a copy of the Provincial Court's Reasons for Sentence, was not withheld. I find that the email contains no reference to legal advice sought or given, nor would it allow inferences about such matters. [Part 3, page 312].

g. An excerpt from one page of the Environmental Protection Officer's handwritten work diary. It contains no reference to legal advice sought or given, nor would it allow inferences about such matters. [Part 6, page 31].

[47] I have marked the information, to which I find s. 14 does not apply, on a copy of the relevant pages of the records that will be sent to the Ministry along with this decision.

Disclosure harmful to law enforcement - s. 15

[48] The Ministry has relied extensively on s. 15(1)(d), and in a few instances s. 15(1)(l), to withhold information from records. These sections read as follows:

> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> …
>
> (d) reveal the identity of a confidential source of law enforcement information,
>
> ...
>
> (l) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

[49] Also relevant to this discussion is the definition of "law enforcement" in Schedule 1 of FIPPA:

> "law enforcement" means
> (a) policing, including criminal intelligence operations,
> (b) investigations that lead or could lead to a penalty or sanction being imposed, or
> (c) proceedings that lead or could lead to a penalty or sanction being imposed;

Section 15(1)(d)

[50] The Ministry has applied s. 15(1)(d) to emails and other correspondence to and from individuals who expressed concerns or complained about how the applicant was operating the landfill. The Ministry disclosed the content of those communications and only withheld the individuals' names, email addresses, phone numbers, home addresses and any other information that identifies them.[31] The Ministry submits that these individuals were a confidential source of law enforcement information.

[51] The Ministry's investigation of the applicant and Valleyview led to a prosecution and the imposition of penalties and sanctions, so they meet the definition of law enforcement in FIPPA. From my examination of the records, the information provided by the individuals whose identities the Ministry refuses to disclose is clearly related to the Ministry's investigation and prosecution of the applicant and Valleyview. Therefore, I find that the individuals were a source of law enforcement information. However, the Ministry must also prove that these individuals were a "confidential" source.

[31] The Ministry also withheld this information under s. 22 as being personal information whose disclosure would, the Ministry believed, be an unreasonable invasion of third party personal privacy within the meaning of s. 22(1) of the Act.

[52] The Ministry submits that the individuals who provided information regarding the operation of the landfill did so in confidence. The Ministry explains that it has an unwritten, established practice to treat the identity of complainants as confidential.[32] The Ministry's Environmental Protection Officer provided the following affidavit evidence about how the Ministry treats information provided by complainants:

> The Ministry's working policy is that it will protect the privacy of any members of the public that call with complaints or concerns about a permitted operation… In cases where there was a need to follow up with a permittee in relation to a complaint, my practice would be to first seek permission from the complainant before revealing any personal information.
>
> I recall some of the third parties that provided information to the Ministry about Valleyview had indicated a concern about possible repercussions from [the applicant]….[33]

[53] The Ministry supplied no evidence that these individuals provided information with the express assurance that their identities would remain confidential. However, in my view, it is reasonable to conclude that an individual complaining or expressing the type of concerns that are revealed in these records would do so with the implied assumption that they were doing so in confidence. As Commissioner Loukidelis said in Order 00-18:

> …Of course, s. 15(1)(d) is not limited to cases where confidentiality is explicitly agreed to or explicitly requested; the section is silent on whether confidentiality is to be implicit or explicit. It may well be easier for a public body to establish confidentiality, of course, if it has an explicit confidentiality policy in place, but there is, strictly speaking, no requirement in s. 15(1)(d) for such a policy.[34]

[54] Given the circumstances of this case and the information at issue, I find that the information supplied by the individuals who complained was supplied in confidence. All of the information withheld under s. 15(1)(d) would clearly identify the individuals and what they communicated to the Ministry about their concerns and complaints regarding the applicant and his operation of the landfill. Further, in my view, the facts of this case are akin to those Orders of this office, which have repeatedly found that the identity of bylaw complainants may be withheld under s. 15(1)(d).[35]

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[32] Ministry's initial submission, para. 4.68 and reply submissions, p. 1.
[33] Environmental Protection Officer's affidavit, para. 29-30.
[34] Order 00-18, 2000 CanLII 7416 (BC IPC), p. 8.
[35] Decision F10-14, 2010 BCIPC 23 (CanLII);Decision F06-04, 2006 CanLII 13533 (BC IPC); Decision F07-01, 2007 CanLII 2527 (BC IPC); Decision F07-02, 2007 CanLII 2529 (BC IPC); and Decision F07-04., 2007 CanLII 9595 (BC IPC).

[55] In conclusion, I find that disclosure of the information withheld under s. 15(1)(d) would clearly reveal the identity of confidential sources of law enforcement information, so the Ministry is authorized to refuse to disclose it on that basis.

Section 15(1)(l)

[56] The Ministry withheld several Government of British Columbia Conferencing Services telephone numbers and participant ID numbers under s. 15(1)(l).[36] In his submissions,[37] the applicant states that he does not object to the Ministry withholding this information, so I will not address it any further.

Disclosure harmful to personal privacy - s. 22

[57] The Ministry is withholding some information in correspondence it received from third parties on the basis that the disclosure would be an unreasonable invasion of third party personal privacy under s. 22. The applicant disputes that the information may be withheld under s. 22.

[58] Numerous orders have considered the application of s. 22, and I have applied those same principles in my analysis below.[38]

Personal information

[59] The first step in any s. 22 analysis is to determine if the information is personal information. Personal information is defined 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".[39]

[60] There is only a small amount of information withheld under s. 22 that I find is not personal information. It is the names, work contact information and job titles for individuals who, in a professional or work capacity, communicated with the Ministry.[40] Because this information is "contact information" it may not be withheld under s. 22.

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[36] Part 4, p. 337 and Part 6, p. 56, 154, 243.
[37] Applicant's initial submissions, para. 68.
[38] See for example, Order 01-53, 2001 CanLII 21607 (BC IPC) at p. 7.
[39] See Schedule 1 of FIPPA for these definitions.
[40] Part 3, pp.213-215; Part 4, p. 111; Part 6, p. 144. The Ministry has already disclosed most of these individuals' contact information along with the content of their communications.

[61] The balance of the information withheld under s. 22 is personal information. For ease of reference, I have categorized it as follows:

A. The identity of individuals who communicated with the Ministry about their concerns or complaints regarding the landfill. Most of this information was also withheld under s. 15(1)(d);

B. Information about Ministry employees' personal lives;

C. The identity of individuals who communicated with the Ministry about the landfill but not for the purpose of complaining or expressing concerns.[41]

D. The identity of the individual whose road access through Crown land near the landfill was cancelled.[42]

Section 22(4)

[62] The next step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4). If it does, then disclosure would not be an unreasonable invasion of personal privacy, so s. 22 does not require that the public body refuse disclosure.

[63] The Ministry submits that none of the personal information falls into the types of information listed in s. 22(4). The applicant submits that ss. 22(4)(a) and (i) apply because he believes that the information in dispute is CV or resume information and by providing it, job applicants waive any claim to privacy.[43]

[64] Section 22(4)(i) states as follows:

> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
> (a) the third party has, in writing, consented to or requested the disclosure,
> …
> (i) the disclosure, in respect of
> (i) a licence, a permit or any other similar discretionary benefit, or
> (ii) a degree, a diploma or a certificate,
> …

[65] None of the information in dispute relates in any way to the information that the applicant submits (i.e., resumes or CVs) and there is nothing to suggest that the third parties have consented in writing to the disclosure of their personal

[41] Part 6, pp. 6, 107 and 284.
[42] Part 3, p. 432 (duplicated at pp. 441, 448, 453 and Part 4, pp. 152, 180, 187). The information revealing that the individual's access was canceled has already been disclosed.
[43] Applicant's initial submissions, paras. 73-74.

information. Therefore, I find that ss. 22(4)(a) and (i) do not apply to the personal information at issue. Nor do any of the other categories of information in s. 22(4).

Section 22(3)

[66] For personal information that does not fall under s. 22(4), the third step in the s. 22 analysis is to determine whether any of the presumptions in s. 22(3) apply, such that disclosure is presumed to be an unreasonable invasion of third party privacy. The Ministry submits that none of the presumptions against disclosure in s. 22(3) apply to the personal information at issue. The applicant makes no submission on this point.

[67] I find that the only presumption that applies is s. 22(3)(b), which states that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation. Section 22(3)(b) applies only to the personal information in category A above that reveals the identity of individuals who communicated with the Ministry about their concerns or complaints regarding the landfill. That personal information is identifiable as part of the Ministry's investigations into a possible violation of the law regarding the applicant's landfill operations, and there is nothing to suggest that disclosure is necessary to prosecute or continue an investigation.

Relevant Circumstances

[68] The final step in the analysis is to consider all relevant circumstances, including those listed in s. 22(2), in deciding whether disclosure of the personal information would be an unreasonable invasion of third party privacy. The following parts of s. 22(2) are relevant here:

> (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,
>
> …
>
> (f) the personal information has been supplied in confidence,
>
> …

[69] The applicant submits that s. 22(2)(a) is relevant because the public needs to know the information that government employees provide in their

resumes for the purpose of being hired. However, as mentioned previously, none of the information in dispute relates to the hiring of government employees.

[70] The Ministry submits that s. 22(2)(a) does not weigh in favour of disclosure because most of the requested information has already been disclosed and disclosure of this personal information would not further the goal of subjecting the activities of the government or the Ministry to public scrutiny. The Ministry also submits that the information withheld under s. 15(1)(d) must also be withheld under s. 22 and that s. 22(2)(f) is a factor weighing against disclosure because the Ministry's policy is to protect the privacy of the individuals who call with complaints or concerns about a landfill operation.

[71] Based on the information before me, I cannot see how disclosing the identity of the individuals who expressed their concerns to the Ministry about the landfill (category A) would add anything to the public debate or is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny. The substance of what they said has already been disclosed to the applicant, and the applicant does not explain why he also needs to know the identity of the third parties or how knowing their identity would shed any light on the Ministry's activities. Further, for the same reasons as outlined above in the s. 15(1)(d) analysis, I believe that the third parties provided their personal information in confidence when they communicated their concerns and complaints about the landfill, and this weighs against disclosure. In summary, I find that disclosure of these individuals' personal information would be an unreasonable invasion of their personal privacy, so the Ministry must continue to withhold this information under s. 22.

[72] In addition, I can see no circumstances that weigh in favour of disclosing the personal information about Ministry employees (category B), such as detail about their leaves, medical appointments and personal home contact information. This information pertains to their personal lives and does not reflect in any way on their work activities related to the applicant and Valleyview. The applicant does not explain why he wants this information, and I can see no relevant factors that weigh in favour of disclosing such information. Therefore, I find that disclosure of these employees' personal information would be an unreasonable invasion of their personal privacy, so the Ministry must continue to withhold it under s. 22.

[73] However, I find otherwise regarding the personal information that does not involve an individual expressing concerns or complaining about the landfill (category C). These three individuals, who were clearly acting in their professional roles, communicated with a Ministry employee about the landfill. The Ministry disclosed what the individuals said along with job titles in two of the instances. There is nothing to suggest that these communications were made in confidence. I can see no factors that weigh against disclosure of this type of

information in this context because the information pertains to work and there is nothing negative or sensitive about it. Therefore, I find that its disclosure would not be an unreasonable invasion of personal privacy.

[74] Finally, the Ministry withheld an individual's name from a table listing "right of way" access to Crown land near the landfill (category D) but disclosed the fact that the individual's road access had been cancelled. The rest of the table lists the right of access given to utility companies and the City of Kamloops. The applicant has presented no information about why he wants to know this name or how disclosure of this person's identity would allow for public scrutiny of the Ministry's activities. The Ministry's only explanation for withholding it is that it is a third party's name. However, given the context of what appears to be a record reflecting public land title information, there is nothing to suggest that disclosing this individual's name would be an unreasonable invasion of his personal privacy.

[75] In conclusion, I find that the Ministry must continue to withhold the personal information of the individuals who expressed their concerns to the Ministry about the landfill (category A) as well as the personal information about Ministry employees (category B). However, the Ministry may not refuse to disclose the rest of the information, namely the contact information, and the information in categories C and D, under s. 22.[44]

Does FIPPA authorize withholding non-responsive information from records?

[76] The Ministry has refused to disclose parts of some of the responsive records because it submits those parts are "non-responsive" to the applicant's access requests.[45]

[77] FIPPA provides a right to access to "records" under s. 4(1) of FIPPA, subject to specific exemptions from disclosure for "information" of the types listed in the exceptions under Part 2, Division 2 of FIPPA.

> 4(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body...
>
> (2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

[44] I have marked the information that may not be withheld under s. 22 in a copy of the records that accompany the Ministry's copy of this decision.
[45] Only one complete record is labeled as "non-responsive", an email at Part 3, p. 363.

[78] The issue here is one of statutory interpretation, namely does FIPPA authorize the Ministry to withhold information from the responsive records on the basis that, in the Ministry's view, that information does not respond to the applicant's request? The Supreme Court of Canada has stated that the modern approach to statutory interpretation requires that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the act and the intention of the legislators.[46] That is the approach I will take in determining what the statutory language in question means.

[79] The Ministry's submissions are in all relevant respects identical to the submissions provided by the Ministry of Children and Family Development in the inquiry that resulted in Order F15-24.[47] Order F15-24 was issued shortly after Order F15-23,[48] which was the first to extensively examine and interpret whether FIPPA authorizes public bodies to withhold portions of records as non-responsive or out of scope of the request. In both F15-23 and F15-24, Deputy Commissioner McEvoy concluded that FIPPA does not authorize a public body to withhold information from a record on the basis that the information is not responsive. Without repeating his reasons at any length here, I agree with what he said is the correct interpretation and I apply it to the facts of this case.

[80] The Ministry submits that, although recent Orders have said otherwise, it is following earlier BC Orders where the Commissioner's delegate accepted that information that was non-responsive could be withheld from responsive records.[49] It writes:

> The Ministry submits that a finding that an applicant is entitled to information that is not responsive to their request, subject to exceptions, would be inconsistent with the scheme of the Act as a whole and its purpose as set out in section 2. In the alternative, the Ministry submits that the approach of the Commissioner's delegates in the Earlier Orders is appropriate in light of the Commissioner's right to control the inquiry process.[50]

[81] The Ministry acknowledges that ss. 3 and 4 of FIPPA apply to "records" as opposed to "information" but it says that neither provision should be interpreted in an "all or nothing" way.[51] It illustrates this point by explaining that even when a record could properly be withheld because it falls outside the scope of FIPPA

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[46] See, for example: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53; Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3; *John Doe v. Ontario (Finance)*, 2014 SCC 36, para. 18.
[47] F15-24, 2015 BCIPC 26. The public body in F15-23 and the Ministry in this case were represented by the same legal counsel.
[48] Order F15-23, 2015 BCIPC 25.
[49] Ministry's initial submission, para. 3.05 and May 25, 2015 submission, paras 203. The Orders it cites are: 03-07, 03-37, F06-03, F07-11, F07-12, F07-13, F07-14, F07-23, F09-23 and F10-20.
[50] Ministry's May 25, 2015 submissions, para 23.
[51] Ministry's May 25 submissions, paras. 20-22.

due to the operation of s. 3, the public body should only apply s. 3 to the *information* in the record to which s. 3 applies. In my view, this is an argument about how a public body may exercise its discretion about what to withhold under FIPPA. It does not convince me to read into ss. 3 and 4 language that is not there about the basis upon which a public body is authorized to refuse to disclose "records" (s. 3) or "information" in a record (s. 4). As noted in Order F15-23, s. 4 expressly addresses the withholding of information from records, but does so with specific reference to the access exceptions in Part 2. There is no language in FIPPA that explicitly or implicitly gives a public body the authority to refuse to disclose information in a responsive record because, in its view, the information is not responsive to the applicant's request.

[82] The Ministry also submits that the Commissioner's powers to control the inquiry processes includes the power to authorize the Ministry to withhold parts of a record as non-responsive.[52] The Ministry relies on Order F08-03[53] and Ontario Order P-207[54] where it was accepted that the Commissioner has the authority to control the inquiry process. However, the fact that the Commissioner can control inquiry procedures does not, in my view, bolster the Ministry's arguments about the interpretation of FIPPA, and I can see nothing in those orders that support the Ministry's arguments in that regard.

[83] The Ministry explains that the process of severing information that the Ministry deems outside the scope of a request allows it to focus on information that an applicant wants. Thus, it does not need to devote time and resources to process information in the records that the applicant does not want.[55] The Ministry provides submissions - supported by the affidavit evidence of the Manager of Information Access Operations with the Ministry of Technology, Innovation and Citizens' Services ("Manager") - about the impact of requiring public bodies to process all of the information in records that are responsive to an access request. For instance, the Ministry submits that it will take more resources and time if public bodies are required to process parts of a record that do not relate to the request. This, it believes, will result in delays that will compromise the ability of public bodies to fulfill their obligations under FIPPA, and the Ministry references the Commissioner's 2014 Special Report where she expressed concerns about the timeliness of government responses to access requests.[56] The increased time to respond to the access request would, the Ministry submits, be "inconsistent with the scheme of the Act as a whole, including sections 6 and 7."

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[52] Ministry's May 25, 2015 submissions, para 25.
[53] Order F08-03, 2008 CanLII 13321 (BC IPC).
[54] 1990 CanLII 3886 (ON IPC).
[55] Ministry's May 25, 2015 submissions, paras. 10-11.
[56] Ministry's May 25, 2015 submissions, paras. 12 and 17. Special Report – A Step Backwards: *Report Card on Government's Access to Information Responses* (April 2013 – March 2014), Elizabeth Denham, Information and Privacy Commissioner, September 23, 2014.

[84] In addition, the Ministry argues that requiring public bodies to process all the information in the records would likely result in more requests for review, complicate the nature of the reviews and add to the time and resources needed.[57] The Ministry also submits that it is rare for applicants to dispute the public body's determination that information is non-responsive to their request and when they do, in most cases, the applicant is satisfied with the public body's explanation. An applicant who does not accept the withholding of non-responsive information, the Ministry submits, can always make a further access request or ask the Commissioner to review the matter.[58]

[85] As previously mentioned, the issue here is one of statutory interpretation, namely does FIPPA authorize the Ministry to withhold information from the responsive records – or parts of the responsive records - on the basis that, in the Ministry's view, the information or parts do not respond to the applicant's request? While the Ministry's submissions and evidence about the impact of being required to process all the information in a responsive record may help in understanding the context in which public bodies operate when processing requests under FIPPA, I give this very little weight in interpreting FIPPA. I agree with Deputy Commissioner McEvoy who said in Order F15-24:

> The ordinary principles of interpretation do not permit me to ignore the plain language of the law. If an interpretation of legislative language would be absurd, that is one thing, but I cannot shape or tailor the statute by reading in language in order to avoid perceived harm or advance supposed benefits.[59]

[86] I recognize that an interpretation that requires public bodies to process all of the information in responsive records may potentially have practical implications. However, there is nothing absurd in such an interpretation and I agree with Orders F15-23 and F15-24 that it is the correct one.

[87] In conclusion, for the reasons stated above, I decline to read into FIPPA an implied authority that enables the Ministry to withhold parts of responsive records on the basis that those parts are non-responsive or outside the scope of the access request. Therefore, the Ministry must respond to the applicant's request as it relates to those portions of the records, withholding only information that it is authorized or required to withhold under Part 2 of FIPPA.

[88] However, I note that there is one complete record which was withheld in its entirety as being non-responsive (an email at Part 3, p. 363). I agree that this record does not contain any information that responds to the applicant's access requests, so the Ministry may continue to withhold it on that basis.

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[57] Ministry's May 25, 2015 submissions, para. 19.
[58] Ministry's May 25, 2015 submissions, para. 26.
[59] Order F15-23, at para 25.

ORDER

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

1. The Ministry in not authorized by s. 3(1)(h) of FIPPA to refuse access to the records or parts of the records.

2. The Ministry is authorized to refuse to disclose information under s. 13(1), 14 and 15(1)(d) and (l), subject to paragraphs 3 and 4 below.

3. The Ministry is not authorized under s. 13 to refuse to disclose the information marked on the following pages: Part 2, page 5 and Part 3, pages 175, 181, 187.

4. The Ministry is not authorized under s. 14 to refuse to disclose the information marked on the following pages: Part 2, pages 6, 12, 13; Part 3, pages 12-14, 200, 267-268, 312; Part 6: page 31.

5. The Ministry must refuse to disclose the information it withheld under s. 22, subject to paragraph 6 below:

6. The Ministry is not required to refuse to disclose under s. 22 the information marked on the following pages: Part 3, pages 213-215, 432, 441,448, 453; Part 4, page 111, 152, 180, 187; Part 6, pages 6, 107, 144, 284.

7. The Ministry is not authorized by FIPPA to refuse to disclose information in the records on the basis that that information is not responsive or outside the scope of the request. Therefore, the Ministry must respond to the applicant's request as it relates to the portions of the records withheld on that basis and which I have not determined may be withheld under ss. 13, 14, 15(1)(d), 15(1)(l) and 22.

8. I require the Ministry to give the applicant access to the information by July 31, 2015. The Ministry must concurrently send the OIPC's Registrar of Inquiries a copy of its cover letter to the applicant, together with a copy of the records.

June 18, 2015

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator