Office of the Information & Privacy Commissioner for British Columbia

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Order F18-38

MINISTRY OF CHILDREN AND FAMILY DEVELOPMENT

Meganne Cameron
Adjudicator

September 27, 2018

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Summary: An applicant requested records that related to himself, his deceased son and his son's death. The applicant made the request on his own behalf and on behalf of his son. The Ministry decided that the applicant's request was not properly made on behalf of his son and he was not authorized to exercise his son's access rights under FIPPA. It provided some records in response to the applicant's own request but refused to disclose parts of them and other records under ss. 3 (scope of the Act), 13 (policy advice or recommendations), 14 (solicitor client privilege), 15(1)(l) (disclosure harmful to law enforcement) and 22 (disclosure harmful to personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) as well as ss. 77(1) and 77(2)(b) of the *Child, Family and Community Services Act* (CFCSA) and s. 110 of the *Youth Criminal Justice Act* (YCJA).

The adjudicator determined that the applicant was not acting on behalf of his son and was not authorized to exercise his son's access rights under FIPPA. The adjudicator found that the Ministry correctly applied ss. 13, 14 and 15(1)(l). The adjudicator also concluded that s. 22(1) of FIPPA and ss. 77(1) and 77(2)(b) of the CFCSA and s. 110 of the YCJA applied to some of the information. It was not necessary for the adjudicator to consider s. 3 of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 5, 13, 14, 15(1)(l) and 22; *Child, Family and Community Services Act,* RSBC 1996 c 46, ss. 77(1) and 77(2)(b); *Youth Criminal Justice Act*, SC 2002 c 1, s. 110.

Cases Considered: *R. v. Campbell*, 1999 CanLII 676 (SCC); *Bank of Montreal v. Tortora,* 2010 BCSC 1430 (CanLII); *British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner)* 1995 CanLII 634

(BCSC); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* 2014 SCC 31 (CanLII); *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII).

INTRODUCTION

[1] This inquiry relates to a request by the applicant to the Ministry of Children and Family Development (Ministry) for his own personal information as well as that of his deceased son (Youth). The request included all information relating to a number of named government employees and any records referencing himself, the Youth, or the Youth's death.

[2] The Ministry decided that the applicant was not authorized to obtain the Youth's personal information under the *Freedom of Information and Protection of Privacy Act* (FIPPA) because his request was not made on behalf of the Youth. It released 879 pages of responsive records related to the applicant's own information and withheld information on 638 of those pages pursuant to ss. 3 (scope of the Act), 13 (policy advice or recommendations), 14 (solicitor client privilege), 15 (disclosure harmful to law enforcement) and 22 (disclosure harmful to personal privacy) of FIPPA as well as ss. 77(1) and 77(2)(b) of the *Child, Family and Community Services Act* (CFCSA) and s. 110 of the *Youth Criminal Justice Act* (YCJA).[1]

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision.[2] Mediation did not resolve the issues and the applicant requested that the matter proceed to inquiry.

ISSUES

[4] The issues to be decided are:

1. Is the applicant acting for, or on behalf of, the Youth in accordance with s. 5(1) of FIPPA, s. 5 of the Regulation?

2. Is the Ministry authorized to withhold information pursuant to ss. 13, 14 and 15 of FIPPA?

[1] Given that the Ministry has applied FIPPA to nearly all of the disputed information, I will consider whether FIPPA applies first before moving on to consider whether the CFCSA and the YCJA apply as well. If there is no right of access to information under FIPPA, it is not necessary to also consider whether the information must be withheld under other legislation.

[2] During the course of this inquiry, the applicant confirmed with the OIPC that he was no longer seeking access to information withheld on 41 pages. Those pages will not be considered in this inquiry.

3. Is the Ministry required to withhold information pursuant to section 22 of FIPPA?

4. Do sections 77(1) and 77(2)(b) of the CFCSA and/or section 110 of the *Youth Criminal Justice Act* apply to some of the withheld information such that it must not be disclosed?

DISCUSSION

Is the Applicant Acting on Behalf of the Youth?

[5] The Ministry says that the applicant is not acting on behalf of the Youth.[3] It points to the original explanation from the applicant's request as evidence in support of its decision.[4] Specifically, the applicant said:

> [the Youth] is deceased and cannot ask for his files. Therefore we are asking for him as his guardians. He wants to make sure other kids don't die. We also want to ensure the file is accurate [and] true.[5]

[6] The applicant says his request was made on behalf of the Youth. He says the Youth is deceased and cannot make the request himself. He also says that he wants to check the accuracy of the information in the file.[6]

[7] Section 5(1) of FIPPA sets out how an applicant may request records on behalf of another person.[7] It says:

> **How to make a request**
>
> 5 (1) To obtain access to a record, the applicant must make a written request that
>
> …
>
> (b) provides written proof of the authority of the applicant to make the request, if the applicant is acting on behalf of another person in accordance with the regulations, …

[8] Section 5(1)(b) of the Regulation sets out when a guardian may act for a deceased minor in making a request under s. 5(1) of FIPPA. It says this:

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[3] Ministry initial submission, at para. 31.
[4] Ministry initial submission, at para. 32.
[5] Ministry initial submission, at para. 32; Affidavit of J.N. at Exhibit A.
[6] Applicant submission, at p. 1.
[7] I note that the Ministry submits that s. 76 of the CFCSA is relevant to this issue. That section specifies that a person "who has legal care of a child" may exercise the child's rights under FIPPA on behalf of the child. In my view, it is more appropriate to apply s. 5 of the Regulation to FIPPA which specifically deals with information requests made on behalf of deceased minors.

Who may act for a deceased individual

5 (1) In this section:

"appropriate person" means,

…

(b) in respect of a deceased minor, one of the following:

(i) the personal representative of the deceased;

(ii) if there is no personal representative of the deceased, a guardian of the deceased immediately before the date of death;

(iii) if there is no personal representative or guardian of the deceased, the nearest relative of the deceased;

[9] The Ministry accepts that the applicant is the appropriate person, pursuant to the Regulation, to make a request on behalf of the Youth under FIPPA.[8] Therefore, it is only necessary for me to determine whether the applicant is acting "on behalf of" the Youth in accordance with s. 5(1) of FIPPA.

[10] The terms "on behalf of" in s. 5(1)(b) of FIPPA and "for" in s. 5 of the Regulation, limit how an applicant may exercise another individual's access rights under FIPPA. In Order F17-04, the adjudicator noted that because the terms have a similar meaning, they should be interpreted consistently to ensure that the shared intent of those provisions is achieved.[9] She defined the terms as follows:

> Dictionary definitions of "for" and "on behalf of" are somewhat circular. For example, definitions of "for" include: "in the interest of"; "to the benefit of"; "on behalf of"; "in place of"; and "representing". Definitions of "on behalf of" include: "in the interests of"; "as representative of"; "in the best interests"; "for"; "in aid of"; and "in support of".[10]

[11] The adjudicator concluded that acting "on behalf of" a minor child in exercising the child's access rights means acting "to benefit the child, to further the child's own goals or objectives and in the child's best interests."[11] Previous orders have also noted that if an applicant is seeking the information in question to further their own interests, they are not acting on behalf of another individual

[8] Ministry initial submission, at para. 30.
[9] In Order F17-04 the adjudicator was considering s. 76 of the CFCSA in addition to FIPPA and the Regulation. In my view her reasoning applies equally to the provisions at issue in this inquiry.
[10] Order F17-04, 2017 BCIPC 4 (CanLII) at para. 16.
[11] Order F17-04, 2017 BCIPC 4 (CanLII) at para. 17.

pursuant to s. 5 of FIPPA.[12] Where an applicant is not truly acting "on behalf" of an individual, the access request is to be treated as an ordinary, arm's-length request under FIPPA, by one individual for another's personal information.[13]

[12] I agree with the Ministry's submission that without additional evidence, the applicant's assertion that he is acting on the Youth's behalf is not sufficient.[14] Based on his submission, I understand the applicant wants to verify the accuracy of the information in the Youth's Ministry file. However, as previous orders have stated, parents must still establish that they are acting on their child's behalf when seeking to exercise access to information rights, even where the child is deceased.[15]

[13] Although the applicant says he is making the request because the Youth is unable, I have no evidence before me that suggests the Youth would have wanted that request to be made. I find that the applicant is not acting on behalf of the Youth and is therefore not authorized to exercise the Youth's access rights under FIPPA. However, that is not the end of the matter. The applicant wants access to the records, so I will now consider his request on the basis that it is made on his own behalf.

Policy advice or recommendations – s. 13(1)

[14] The Ministry relies upon s. 13(1) of FIPPA to withhold three pages from the applicant.[16] It says the pages are draft versions of correspondence from the Deputy Minister to the applicant with suggested revisions from Ministry staff.[17] The applicant makes no submissions regarding the application of s. 13(1) to these pages.

[15] 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. This section 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.[18] BC

[12] For example, see: Order 17-04, 2017 BCIPC 04 (CanLII) at paras. 18-20; Order F07-16, 2007 CanLII 35477 (BC IPC) at paras. 19-20; Order 02-44, 2002 CanLII 42478 (BCIPC) at paras. 39-40; and Order No. 53-1995, 1995 CanLII 1121 (BC IPC) at p. 6.
[13] Order 00-40, 2000 CanLII 14405 (BC IPC) at para. 40
[14] Ministry submission, para. 33.
[15] See for example, Order 02-44, 2002 CanLII 42478 (BC IPC) at paras. 9, 17 and 43; Order 02-1994, 1994 CanLII 1208 (BC IPC) at p. 7; Order F07-16, 2007 CanLII 35477 (BC IPC) at para. 19-20.
[16] Pages: 617, 619 and 623.
[17] Affidavit No. 2 of B.R. at Exhibit A, p. 24.
[18] Order F15-25, 2014 BCIPC 27 (CanLII) at para. 15.

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.[19]

[16] The process for determining whether information may be withheld under s. 13(1) involves two stages. 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, it is then necessary to consider whether the information falls within any of the categories of information listed in s. 13(2).[20] Information and records that fall within s. 13(2) must not be withheld under s. 13(1).

[17] The Ministry says that the three pages it has applied s. 13(1) to contain advice from Ministry employees to the Ministry with respect to the drafting of a letter.[21] Section 13(1) does not automatically apply to draft correspondence; a public body can withhold only those parts of a draft which are actually advice or recommendations.[22] Previous orders have determined that s. 13(1) also applies to drafts that would enable an applicant to draw accurate inferences about advice or recommendations based on changes to the letters from the draft to the final version[23] and to handwritten editorial comments[24] regardless of whether the recommendations were ultimately followed in the final version.[25]

[18] The draft copies the Ministry seeks to apply s. 13(1) to in this inquiry have "tracked changes" from a word processing program such that the applicant would be able to see the original version as well as the suggested changes. I accept that the suggested changes are advice and recommendations and conclude that s. 13(1) applies.

Analysis and Conclusion on Section 13(2)

[19] The applicant does not make any specific submissions on s. 13(2). The Ministry submits that none of the categories of information listed in s. 13(2) apply to the information in dispute. I have considered s. 13(2), and I find that none of the categories listed in that section apply to the information in dispute. The Ministry is therefore authorized to withhold the information pursuant to s. 13(1).

[19] Order F15-25, 2014 BCIPC 27 (CanLII) at para. 17.
[20] Order F13-08, 2013 BCIPC 9 (CanLii), at para. 27.
[21] Ministry initial submission, at para. 87-88.
[22] Order 03-37, 2003 CanLII 49216 (BC IPC) at para. 59.
[23] Order F15-33, 2015 BCIPC 36 (CanLII) at para. 23.
[24] Order 03-37, 2003 CanLII 49216 (BC IPC) at para. 57.
[25] Order F07-17, 2007 CanLII 35478 (BC IPC) at para. 28.

Section 14 – Legal Advice Privilege

[20] 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 Ministry is relying on s. 14 to withhold all of the information in 347 pages because it says that legal advice privilege applies. Legal advice privilege is a type of solicitor client privilege that applies to confidential communications between solicitor and client for the purposes of obtaining and giving legal advice.

[21] Not every communication between client and solicitor is protected by solicitor client privilege.[26] The test for determining whether legal advice privilege applies has been articulated by the courts as follows:

> 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.
>
> If these four conditions are satisfied then the communications (and papers relating to it) are privileged.[27]

[22] The above criteria have consistently been applied in OIPC orders, and I will take the same approach here. [28]

[23] The Ministry says the pages it applied s. 14 to contain communications with its lawyers that were intended to be confidential and directly relate to the seeking, formulating or giving of legal advice.[29] It submits that it has also applied s. 14 to some communications that do not directly seek or give legal advice but are part of "ongoing communications so that legal advice may be sought and given" and that if disclosed, accurate inferences could be drawn about legal advice sought or provided.[30] The Ministry further states that although some communications were shared outside of the Ministry, they are also

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[26] Order 17-35 2017 BCIPC 35 (CanLII), para. 70.
[27] R. v. B., 1995 CanLII 2007 (BC SC), 1995 CanLII 2007 (BCSC) at para. 22. See also Canada v. Solosky, 1979 CanLII 9 (SCC) at p. 13.
[28] Order F17-23, 2017 BCIPC 23 (CanLII) at para. 36 citing: Order F15-52, 2015 BCIPC 55 (CanLII), para. 10; Order F15-67, 2015 BCIPC 73 (CanLII), para. 12.
[29] Ministry's initial submission, paras. 103-108; Affidavit No. 1 of B.R., at paras. 4 and 7; Affidavit of N.B., at paras. 4 and 7.
[30] Ministry's initial submission, para. 116. Affidavit No. 1 of B.R., at para. 8; Affidavit of N.B., at para. 8.

privileged as the parties had a common interest in the advice provided and the information was otherwise kept confidential.[31]

[24] The applicant submits that not all of the information on the pages the Ministry has withheld is subject to s. 14. He says that communications do not become privileged simply because a lawyer has been copied on an email.[32] The applicant submits that there is information in the pages the Ministry is withholding that is not privileged because:

- it is unclear that the lawyers participating in the communications were acting in their capacity as legal counsel;
- the communications were shared outside the direct solicitor client discussion; and
- privilege has been waived.[33]

[25] Finally, the applicant further asserts that the Ministry has not severed the records in good faith and says that because the information he believes is being withheld would reveal negligent action on the part of the Ministry, there should be a higher threshold for proving it is privileged.[34]

[26] The Ministry did not provide me with copies of the records to which it applied s. 14. Instead, it submitted two tables (Tables) that provide a summary of the pages it has withheld under s. 14, including the type of record (i.e., an "email chain"), the date of, and parties to, the communication and a brief description of the content.[35] Based on the descriptions provided in the Tables, the information the Ministry says is subject to s. 14 can be divided into four groups depending on the type of communication and the parties' involved:

A. Communications between the Ministry and its lawyers;[36]

B. Ministry employee communications which do not include its lawyers but refer to previously obtained legal advice;[37]

C. Ministry employee communications which do not include its lawyers but discuss legal advice the Ministry intends to obtain;[38] and

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[31] Ministry's third submission, paras. 2-6; Affidavit of C.D., paras. 4-7.
[32] Applicant's initial submission, p. 2; Applicant's second submission, para. 5.
[33] Applicant's second submission, paras. 6-7.
[34] Applicant's second submission, para. 4.
[35] Affidavit No. 1 of B.R., at para. 6; Affidavit No. 2 of B.R., at Exhibit A.
[36] Pages 19-20, 22-46, 54, 71-94, 103-113, 121-122, 125-128, 130-131, 174-179, 197-208, 217-226, 241-244, 246-280, 282-283, 289-290, 292-295, 299-301, 335-393, 449-456, 460-466, 480-505, 530-550.
[37] Page 245.
[38] Pages 114-119, 281, 287-288, 291, 302-303, 394-447.

D. Communications between Ministry employees, its lawyers and outside parties.[39]

[27] I will analyze each of the four groups separately.

Category A - Communications between the Ministry and its lawyers

[28] The communications in this category are all between the Ministry and lawyers at the Ministry of Attorney General's Legal Services Branch. The Supreme Court of Canada held in *R. v. Campbell* that solicitor client privilege arises when in-house government lawyers provide legal advice to their client, a government agency.[40] The court also stated that not everything done by a government lawyer attracts solicitor client privilege because government lawyers may also have work duties outside of providing legal advice. Whether or not solicitor client privilege attaches in these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.[41]

[29] The Ministry provided affidavits from two lawyers at Legal Services Branch who attested that they provided the Ministry with legal advice about matters relating to the information in dispute in this inquiry. They also say that the information the Ministry has withheld reveals confidential communications they had with Ministry employees that was directly related to the formulating or giving of legal advice to the Ministry.[42] One of the lawyers also deposed that she had reviewed the records in dispute and "in each instance where the Ministry has applied s. 14" she and the other lawyer involved in the communications were acting in their capacity as lawyers.[43] She also stated that any full or partial disclosure of the records in dispute would disclose privileged information.[44]

[30] I have considered the applicant's submission that lawyers have simply been copied on some of these communications, that they have not directly provided advice and that s. 14 does not apply.[45] I agree that the fact that a lawyer is included on an email does not necessarily mean that the email is privileged. However, the scope of solicitor client privilege extends beyond merely requesting or providing legal advice and includes:

> communications that are "part of the continuum of information exchanged," provided the object of the communication is to seek or provide legal advice. This continuum of communications can include

[39] Pages 471-477.
[40] Order F17-23, 2017 BCIPC 23 (CanLII) at para. 40 citing: *R. v. Campbell*, 1999 CanLII 676 (SCC), at para. 49.
[41] *R. v. Campbell*, 1999 CanLII 676 (SCC), at para. 50.
[42] Affidavit No. 1 of B.R., at para. 7; Affidavit of N.M, at para. 7.
[43] Affidavit No. 2 of B.R., at para. 15.
[44] Affidavit No. 2 of B.R., at paras. 15-17.
[45] Applicant's initial submission, at p. 2.

> information the client provides to legal counsel that is related to the advice sought, including purely factual information, as well as internal client communication related to the legal advice received and its implications.[46]

[31] In some email chains it is unclear if the Ministry lawyer was directly involved in communicating with the Ministry or merely received a copy of an email exchange between others. Based on the information the Ministry provides, however, I am satisfied that in those instances the email chain is part of the continuum of communications necessary to provide legal advice. That is because there is evidence that the topic of these emails is the same as the topic for which the Ministry was seeking, and the lawyer providing, legal advice.[47] In the circumstances, I conclude that these emails were part of the continuum of communications in which legal advice was sought and provided. Further the Ministry has provided evidence that the communications were confidential between the Ministry and its lawyers.[48] Therefore, I am satisfied legal advice privilege applies to them and they may be withheld under s. 14.

[32] Based on my review of the descriptions provided by the Ministry and the affidavits of the Ministry's lawyers, I find that s. 14 applies to all of the pages listed in Category A for the reasons set out above.

Category B - Ministry employee communications referring to legal advice

[33] The communications in this category are between Ministry employees and do not include lawyers. The Tables refer to one email communication of this type.[49] The Ministry describes this page as an email chain between Ministry employees that contains legal advice provided by its lawyers about speaking notes for the Minister.[50]

[34] Courts have stated that privilege will extend to include employees discussions and comments about their employer's privileged communications with lawyers.[51] Based on my review of the Tables and the description for this page I accept that the Ministry employees were discussing confidential legal advice provided by their lawyers in this email chain. Therefore, I find that it is

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[46] Order F17-43, 2017 BCIPC 47 (CanLII), para. 40, citing: *Huang v Silvercorp Metals Inc.*, 2017 BCSC 795 (CanLII), para. 83 and *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 (CanLII), paras. 22 – 24.

[47] For example, pages 45-46, 71-74, 114-119 are about drafting communications to the applicant and pages 77-94, 217-223, 241-246 relate to legal advice to the Minister about speaking and information notes. It is evident from the Tables that the Ministry obtained legal advice on both of these topics, as well as the rest of the topics discussed in the records within Category A.

[48] Affidavit No. 1 of B.R., at para. 7; Affidavit of N.M, at para. 7.

[49] Page 245.

[50] Affidavit No. 1 of B.R., at p. 7; Affidavit No. 2 of B.R., at Exhibit A, p. 13.

[51] Order F17-39, 2017 BCIPC 43 (CanLII), citing *Bank of Montreal v. Tortora,* 2010 BCSC 1430 (CanLII), para. 12.

privileged and the Ministry is authorized to withhold the Category B record pursuant to s. 14.

Category C - Ministry employee communications discussing need to obtain legal advice

[35] All of the communications in this category are email chains between Ministry employees and do not include lawyers. The evidence in the Table is that these email chains are about: "the need to have legal counsel provide an opinion on the matters being discussed", "questions to be posed to legal counsel", "the need for a legal update", "the need to elicit legal advice from LSB", and "what information will be given to legal counsel."[52]

[36] Discussing the need for advice does not generally attract solicitor client privilege. As noted in Order F17-23,

> […] Ministry employees' communications about the intent or need to seek legal advice at some point in the future does not suffice on its own to establish that there was any confidential communication between the Ministry and its legal advisor. In order to establish that privilege applies to a communication, there must be evidence that disclosure of that communication would reveal actual confidential communication between legal counsel and the client.[53]

[37] However, in that Order the adjudicator concluded s. 14 was properly claimed because it was clear that the Ministry eventually did seek and receive legal advice regarding the particular issues previously discussed between government employees.[54] That is because the preliminary discussions would reveal the precise subject of the subsequent legal advice. I am able to draw similar conclusions for the pages in dispute in Category C in this inquiry.

[38] There are several instances where the Table says that a record is a staff communication about the need to seek legal advice on a particular matter and then a subsequent record reveals that advice was actually sought and received on that matter.[55] However, there are also instances where it is not at all evident that the legal advice Ministry staff discussed needing was actually sought and/or received. What is clear, based on the rest of the information in the Tables, is that legal advice was provided on multiple occasions those same days and in the days that followed. I accept on a balance of probabilities that at least some of that advice related to the matters the Ministry employees discussed needing.[56]

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[52] Pages 114-119, 281, 287-288, 291, 302-303, 394-447.
[53] Order F17-23, 2017 BCIPC 24 (CanLII), para. 49.
[54] Order F17-23, 2017 BCIPC 24 (CanLII), para. 50.
[55] Pages 14-119 , 71-74, 281, 278-280.
[56] Pages 287-288, 291 and 302-303.

[39] I am also satisfied that all of the communications were confidential communications that only included the Ministry employees and its lawyers. In conclusion, I find that the Ministry has established that the Category C records are protected by legal advice privilege and they may be withheld under s. 14.

Category D - Communications between Ministry employees, its lawyers and outside parties

[40] The communications in this category, pages 471-477, include individuals other than Ministry employees and their lawyers.[57]

[41] Pages 471-477 were described by the Ministry as email chains discussing and forwarding an "entered order" (presumably a court order). The emails are also described as being between Ministry staff, Legal Services Branch lawyers and two other individuals.[58] The individuals were described in the Ministry's affidavits as a contractor for the Ministry who was akin to a Ministry employee and an individual from a non-profit social services society that "had an interest in this information."[59]

[42] Typically, communications that include individuals outside of the solicitor client relationship will not attract privilege as they are not confidential communications between a lawyer and a client. However, these types of communications may still be privileged if the parties to the communication share a common goal, seek a common outcome or have a "selfsame interest."[60] Specifically, where two or more persons who each have an interest in some matter jointly consult a lawyer, their communications with that lawyer, although known to each other, are privileged against the outside world.[61]

[43] During the inquiry I invited the Ministry and applicant to make further submissions on whether s. 14 applied to pages 471-477. Both parties provided an additional submission. The applicant said that the contractor was not an employee of the government and was "therefore not even entitled to be covered by a taxpayer funded lawyer."[62]

[44] The Ministry submitted that the court order that was forwarded in the communications in question provided the contractor with access to Ministry information.[63] It provided affidavit evidence from the lawyer involved in the

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[57] Pages 471-477.
[58] Affidavit No. 2 of B.R., at Exhibit A, p. 19.
[59] Affidavit No. 2 of B.R., at paras. 19-20; Affidavit of C.R., at paras. 6-7.
[60] *Pritchard v. Ontario (Human Rights Commission),* 2004 SCC 31 (CanLII) at para. 24; citing: *Buttes Gas & Oil Co. v. Hammer (No. 3)*, [1980] 3 All E.R. 475 (C.A.), at p. 483.
[61] *Pritchard v. Ontario (Human Rights Commission),* 2004 SCC 31 (CanLII) at para. 24; citing: *R. v. Dunbar* (1982), 1982 CanLII 3324 (ON CA) at p. 245.
[62] Applicant's third submission (June 1, 2018), at para. 1.
[63] Ministry's fourth submission (May 23, 2018), at para. 2.

communications that she acted as counsel for the Ministry as well as the contractor when obtaining the order that is the subject of the communications.[64]

[45] With regard to the individual from the society, the Ministry submitted that the society had "a common interest" in obtaining the court order in the sense that both the society and the Ministry wanted the contractor to be granted access to information he required to perform his duties.[65] The Ministry's lawyer attested that the individual from the society did not attend the court application and that she relied on the lawyer to advise her of the outcome.[66]

[46] The lawyer also attested that the communications in question were directly related to her giving of legal advice to her Ministry clients (including the Ministry's contractor), that the communications were confidential in nature, and that the individual at the society had a common interest in the information in the communication.[67]

[47] Based on the submissions and evidence offered by the Ministry I am satisfied that the Category D records, pages 471-477, are confidential communications between the Ministry and its lawyer that were related to the provision of legal advice. I find that the communications were confidential despite the inclusion of the contractor and the individual from the society because they sought a similar outcome with regard to the application the lawyer attended to obtain the order and had a common interest in her advice from regarding that matter.

Severing

[48] Section 4(2) of FIPPA requires public bodies to review each record line by line and decide which parts "can reasonably be severed" and withheld and disclose the balance.

[49] The applicant submits that although some information on a given page may be legitimately withheld under a section of FIPPA, it is not necessarily the case that all of the information on that page is subject to that section. He says, for example, that if the document in question is an email between a Ministry employee and its lawyer, the email header and potentially some of the content should still be disclosed.[68]

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[64] Affidavit of C.D., para. 6.
[65] Affidavit of C.D., para. 3. I note that based on my review of the information in dispute that is not subject to s. 14, I am satisfied that the society had an interest in the Ministry obtaining the court order that is the subject of the communications on pages 471-477.
[66] Affidavit of C.D., para. 7.
[67] Affidavit of C.D., paras. 5-7.
[68] Applicant's initial submission, at pp. 2-3.

[50] The Ministry says that it would not be appropriate to require further severing of documents that have been withheld pursuant to s. 14.[69] It submits that the Supreme Court of British Columbia has stated that s. 4(2) of FIPPA does not modify or dilute solicitor client privilege and that in most cases where privilege applies, it applies to the whole document.[70]

[51] The British Columbia Court of Appeal has clarified that s. 4(2) of FIPPA may be applied where part of a document subject to a claim under s. 14 is not subject to legal advice privilege and a separate part is privileged. In such a case, the non-privileged part can "reasonably be severed".[71] In this case, I have concluded that the information the Ministry has withheld pursuant to s. 14 is privileged, including the emails and documents attached to them. There are no discrete portions which are not privileged. [72] As such, this is not a case where it would be reasonable for the Ministry to sever information from part of a record and then disclose the remainder.

Discretion

[52] The word "may" in s. 14 confers on the head of a public body the discretion to disclose information that could otherwise be withheld under that section. In other words, the Ministry may choose to disclose records that are protected by solicitor client privilege. As noted in previous orders, the head of a public body must exercise its discretion lawfully, and the Commissioner may return the matter to the public body for reconsideration if the discretion was exercised bad faith or for an improper purpose or if the head took into account irrelevant considerations or failed to take into account relevant considerations.[73]

[53] The applicant in this case says that the Ministry has intentionally labelled non-privileged communications as privileged to avoid negative attention.[74] There is no evidence before me in support of that submission. The Ministry has provided sworn affidavits from three of its lawyers and their evidence establishes that the information withheld pursuant to s. 14 is subject to solicitor client privilege. In the face of that evidence, I do not accept the applicant's bare assertion that the Ministry is using its lawyers to hide information that it would otherwise be required to disclose under FIPPA.[75]

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[69] Ministry initial submission, at para. 125.
[70] Ministry initial submission, at para. 125, citing: *British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner)* 1995 CanLII 634 (BCSC).
[71] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII), para. 68.
[72] See also: Order F16-09, 2016 BCIPC 11 (CanLII), at para. 15.
[73] Order F17-35, 2017 BCIPC 37 (CanLII), at para. 88.
[74] Applicant's second submission, at para. 6.
[75] Applicant's third submission, at para. 1.

[54] The Ministry acknowledges that s. 14 is a discretionary exception.[76] However, it specifies that it intended to keep the communications in question confidential.[77] As such, I am satisfied that the Ministry exercised its discretion and that it did so having considered only relevant considerations. Furthermore, as emphasized in Order F16-35, given "the importance of solicitor client privilege to the legal system, it is difficult to conceive of a situation where a public body – having established that records are protected by solicitor client privilege – could then be found to have improperly exercised its discretion to withhold information under s.14."[78] I see nothing that would warrant interfering with the Ministry's decision to continue to assert privilege over the information it withheld pursuant to s. 14.

Section 15 – Disclosure harmful to law enforcement

[55] The Ministry says that s. 15(1)(l) applies to the "User IDs of Ministry employees" (User IDs) which appear on five pages.[79] The applicant made no submission regarding this matter. Section 15 reads 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…
>
> (l) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system

[56] Section 15(1)(l) requires that the specified harm "could reasonably be expected to" occur. Although there is no need to establish certainty of harm, it is not sufficient to rely on speculation.[80] The appropriate standard of proof for provisions containing this test was set out by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* as follows:

> This Court in Merck Frosst adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in Merck Frosst emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground…[81]

[76] Ministry initial submission, at para. 91 and 117.
[77] Ministry initial submission, at para. 120.
[78] Order F16-35, 2016 BCIPC 39 (CanLII), at para. 23. See also: Order F17-35, 2017 BCIPC 37 (CanLII), at para. 90.
[79] Ministry initial submission, at para. 128; Affidavit No. 2 of B.R., at Exhibit A; The information in dispute for s. 15 is on pages 778, 782, 859, 861, 863 and 873.
[80] Order 00-10, 2000 CanLII 11042 (BC IPC) at p.10.
[81] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* 2014 SCC 31 (CanLII) at para. 54.

[57] The Ministry says it has applied s. 15(1)(l) in a "relatively small number of instances to User IDs of Ministry employees" and that BC Order F14-19 "accepted that User ID and passwords should be withheld as disclosure would compromise the security of a computer system."[82]

[58] I have reviewed Order F14-19 in which the adjudicator concluded that in the absence of a User ID and password, he did not accept that disclosure of BC Ferries' website address could reasonably be expected to harm the security of BC Ferries computer or communications system.[83] While the adjudicator's reasons do not necessarily suggest that a User ID in isolation (i.e., absent a password) should be withheld under s. 15(1)(l), I find that in the present case, there is a basis for doing so.

[59] In *Ontario (Community Safety and Correctional Services),* the Court instructed that the quality of evidence needed to meet a standard of a reasonable expectation of probable harm standard "will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences."[84] A number of the records that have already been disclosed to the applicant contain internet pathways to portals where Ministry records are kept. It is reasonable to assume that an unauthorized individual seeking to gain access to Ministry records who is armed with the appropriate pathway may have an easier time accessing the records if they already have access to a User ID.[85] Given that Ministry records relate to child protection investigations and are particularly sensitive, I find that it is appropriate, in this case, that the Ministry be permitted to withhold those User IDs pursuant to s. 15(1)(l).

***Harmful to personal privacy*—Section 22**

[60] Section 22(1) states that a "public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy."[86]

[61] The Ministry says that s. 22 of FIPPA applies to a significant amount of the information in dispute. Under s. 57(2) the applicant has the burden of proof

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[82] Ministry initial submission, at para. 128; Citing Order F14-19, 2014 BCIPC 22 (CanLII), at para. 49.
[83] Order F14-19, 2014 BCIPC 22 (CanLII), at para. 50.
[84] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* 2014 SCC 31 (CanLII) at para. 54.
[85] In this case, there is no indication that the applicant would attempt to access the Ministry's records. However, disclosure of information to an applicant through FIPPA amounts to public disclosure: Order F15-63, 2015 BCIPC 69 (CanLII) at para. 47; Order 01-52, 2001 CanLII 21606 (BC IPC) at para. 73.
[86] Schedule 1 of FIPPA says: "third party" in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than (a) the person who made the request, or (b) a public body.

regarding third party personal privacy and it is therefore up to him to establish that disclosure of the third party personal information in dispute would not be an unreasonable invasion of third party personal privacy. Despite this, the applicant has made only limited submissions with regard to s. 22 and they relate primarily to whether the Ministry has provided sufficient information about its application of that section.

[62] Numerous orders have considered the application of s. 22, and I will apply those same principles in my analysis.[87]

Personal Information

[63] The first step in the s. 22 analysis is to determine if the information in dispute 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."[88]

[64] The Ministry says the information it claims s. 22 applies to is personal information and is not contact information. It submits the information qualifies as "recorded information about identifiable individuals in that it either directly identifies an individual by name or position or is reasonably capable of being attributed to a particular individual when combined with other available sources of information."[89]

[65] I have reviewed the information in dispute and find that there is a significant amount of contact information that has been improperly withheld pursuant to s. 22. This information includes Ministry employees' signature blocks and email addresses as well some contact information for journalists and employees of agencies with whom the Ministry had communications. It is evident that the journalists were contacting the Ministry in a professional capacity and not a personal one. This information is not personal information so the Ministry is not authorized to refuse access to it under s. 22.

[66] The Ministry has also relied on s. 22 to withhold information that is not recorded information about an identifiable individual. This information includes logos and page numbers, the contents of briefing notes, portions of printouts

[87] See for example, Order F17-16, 2017 BCIPC 17 (CanLII) at para. 99; Order 01-53, 2001 CanLII 21607 (BC IPC) at p. 7.
[88] See Schedule 1 of FIPPA for these definitions.
[89] Ministry initial submission, at para. 132.

from the Ministry's computer file system and the dates and subject lines of some emails.[90] This information may not be withheld pursuant to s. 22.

[67] The balance of the information in dispute is third party personal information. For example, some of the information is about the Youth, the Youth's mother, Ministry workers, and other youths and adults. In many cases, this information is intertwined with the personal information of the applicant and other third parties.

Section 22(4)

[68] 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, disclosure would not be an unreasonable invasion of personal privacy.

[69] The Ministry submits that none of these circumstances apply to the information in dispute. However, I find that s. 22(4)(e) applies to some of the personal information. Section 22(4)(e) states:

> 22(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
> …
>
> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

[70] Section 22(4)(e) covers personal information that is about an individual's job duties in the ordinary course of work-related activities, namely objective factual information about what he or she did or said in the normal course of discharging his or her job duties.[91]

[71] I find that there is objective, factual information about what these Ministry employees and contractors did in the normal course of carrying out their work functions.[92] For example, some of the information relates to setting up interviews, sending memos, confirming which employee would perform specific work-related tasks and discussing legislation and Ministry protocols and procedures. The parts of the information in dispute which contain this sort of information cannot be withheld under s. 22(1).[93]

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[90] For example, pages 15-17.
[91] Order 00-53, 2000 CanLII 14418 (BC IPC) at p. 7.
[92] The definition of "employee" in FIPPA includes a service provider. A "service provider" means a person retained under a contract to perform services for a public body. Therefore, a "contractor" is an "employee" for the purpose of s. 22(4)(e). See schedule 1 of FIPPA for these definitions.
[93] For example, pages: 12, 231, 234, 236, the majority of 467 and the second line of page 684.

Section 22(3)

[72] The next step in the analysis is to determine whether s. 22(3) applies to any of the personal information. Section 22(3) describes circumstances where disclosure of personal information is presumed to be an unreasonable invasion of a third party's privacy. The Ministry submits that ss. 22(3)(a), 22(3)(b) and 22(3)(d) apply. For the reasons that follow, I find that each of those sections applies to at least some of the personal information in dispute. I do not find that any of the other subsections under s. 22(3) are applicable.

[73] Section 22(3)(a) – This section provides that disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if "the personal information relates to a medical, psychiatric, or psychological history, diagnosis, condition, treatment or evaluation." Upon reviewing the severed information in the records, I agree with the Ministry that there is a small amount of third party medical and psychological information which falls under the s. 22(3)(a) presumption. This information primarily relates to the diagnosis, evaluation or treatment of third party youth and its disclosure is therefore presumed to be an unreasonable invasion of third-party privacy.

[74] Section 22(3)(b) - Section 22(3)(b) of FIPPA creates a presumption against disclosure where 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."

[75] The Ministry says it has withheld a "substantial amount of information that relates to allegations of child abuse," which is a violation of the law.[94] However, its submission is silent with regard to whether the information it asserts s. 22(3)(b) applies to was "compiled". The Webster's New World Dictionary defines "compile" as meaning to gather and put together (statistics, facts, etc.) in an orderly form or to compose (a book etc.) of materials gathered from various sources.[95] In Order 268-1998, former Commissioner Flaherty considered the definition of compiled and concluded it meant information that "was drawn from several sources or extracted, extrapolated, calculated or in some other way manipulated."[96]

[76] I find that some of the information in dispute was compiled within the meaning of s. 22(3)(b) as part of an investigation into a possible violation of the law. For example, I accept that information from the Ministry's online filing system which summarizes evidence gathered during investigations was compiled as part of the Ministry's response to allegations that could result in sanctions or penalties

[94] Ministry initial submission, at para. 137.
[95] Webster's New World College Dictionary, 5th ed, *sub verbo* "compile."
[96] Order No. 268-1998, 1998 CanLII 3461 (BC IPC), at para. 5.

under the CFCSA. This type of information raises the s. 22(3)(b) presumption, as do emails that provide overviews of the information gathered during interviews with third parties about child protection matters.[97]

[77] However, there is some information in dispute that while related to various child protection investigations, was not "compiled" during an investigation. This type of information includes internal emails between Ministry workers inquiring about investigative steps or making plans of action.[98] Information of this nature is not subject to the 22(3)(b) presumption.

[78] Section 22(3)(d) – This section specifies that the disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if it "relates to the third party's employment, occupational or educational history."

[79] Only one small piece of information falls within this section. It is a sentence in an email which reveals a third party's employer and training plan and it is the type of information that this presumption covers.[99]

Section 22(2)

[80] The next step is to consider whether disclosure of the information in dispute would be an unreasonable invasion of third party personal privacy with regard to all relevant circumstances, including the circumstances listed under s. 22(2). It is at this step that the s. 22(3) presumptions may be rebutted.

[81] The Ministry says the following sections apply:

> (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, …
>
> (i) the information is about a deceased person and, if so, whether the length of time the person has been deceased indicates the disclosure is not an unreasonable invasion of the deceased person's personal privacy.

[97] Order 04-22, 2004 CanLII 45532 (BC IPC) at paras. 37-40. See for example, records at pp. 876 and 138-139.
[98] Page 154 and the first line of page 684.
[99] Page 320.

[82] Section 22(2)(a) – Section 22(2)(a) requires that the head of a public body consider whether disclosure is desirable for the purpose of subjecting the activities of the government or a public body to public scrutiny.[100] Previous orders have specified the following about s. 22(2)(a):

> What lies behind s. 22(2)(a) of the Act is the notion that, where disclosure of records would foster accountability of a public body, this may in some circumstances provide the foundation for a finding that the release of third party personal information would not constitute an unreasonable invasion of personal privacy.[101]

[83] The applicant suggests the information in dispute should be disclosed because it might reveal if government employees were negligent or the Ministry mismanaged its responsibilities.[102]

[84] The Ministry says that section 22(2)(a) does not apply. It says the majority of the information it has withheld under s. 22 of FIPPA has also been withheld as information subject to solicitor client privilege or other provisions under the CFCSA and the YCJA. The Ministry says that s. 22(2)(a) is not a factor in favour of disclosure of the third party personal information. It says that disclosing the small amount of third party personal information it withheld under s. 22, that is not protected by solicitor client privilege, the CFCSA and the YCJA, would not subject the Ministry to public scrutiny because it is primarily about third parties.

[85] I have considered the parties' submissions with particular consideration for what the applicant said. I have also considered the context of the information and what has already been disclosed to the applicant and the public. I cannot see how disclosing the specific instances of personal information in this case would add anything to what the applicant and the public already know about what the government and the Ministry did and how they handled their responsibilities. In conclusion, I cannot see how disclosing the third party personal information would subject the activities of the government or the Ministry to public scrutiny in any meaningful way. I am satisfied that this section does not apply.

[86] Section 22(2)(f) – This section states that when determining 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 whether the personal information was supplied in confidence.

[87] The Ministry says that it treats matters related to ss. 77(1) and 77(2)(b) of the CFCSA and s. 110 of the YCJA as sensitive and highly confidential and it submits that it has confidentiality obligations with regard to this information.[103]

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[100] Order F12-10, 2012 BCIPC 14 (CanLII), at para. 35.
[101] Order F05-18, 2005 CanLII 24734 (BC IPC), at para. 49.
[102] Applicant's initial submission, at p. 2, para. 4.
[103] Ministry initial submission, at para. 145-146.

[88] In my view, it is not enough to say that the information is confidential. Section 22(2)(f) requires that the information be supplied in confidence. I find that much of the information was generated by the Ministry and was not supplied to the Ministry in confidence, specifically the following:

- Emails between employees and supervisors for the purpose of developing responses to media inquiries; and
- Communications to the Youth's family after his death.

[89] However, I find that some of the information in dispute was supplied in confidence. For example, information provided to the Ministry by a third party in the context of an interview about the safety and well-being of a child.[104]

[90] Section 22(2)(i) - Section 22(2)(i) requires public bodies to consider the length of time the person has been deceased when deciding if disclosure of the deceased's personal information would be an unreasonable invasion of the deceased person's personal privacy. The Ministry submits that the amount of time that has passed since the Youth's death is similar to previous orders where adjudicators determined that the personal information of a deceased had not lost any of its currency or sensitivity.[105] Specifically, it submits that Order F15-36 is relevant. The adjudicator in that case stated:

> Past orders have said that deceased individuals have privacy rights, although such rights may diminish with time. There have been several orders where the time elapsed between the death and the access request were similar to the time frame in this case. In Order F14-43, the applicant requested the health records of his father who had died approximately two years earlier. In Order F15-14, only two and a half years passed between the death of the individual and the request for the personal information. In Order F15-01, a similarly short period of time elapsed between the death and the request for Coroner's records about the deceased. In all three cases, the adjudicator found that the short period of time was a factor weighing against disclosure.[106]

[91] The Youth in this case has been deceased for less than five years. As the Ministry stated, the time frame is similar to that of orders where the adjudicator found that the length of time was short and weighed against disclosure. I consider the length of time the Youth has been deceased to be a short period of time such that the sensitivity of his personal information has not diminished appreciably. I find that this weighs against disclosure.

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[104] For example, pages 839-840. I note that this information also falls within the 22(3)(b) presumption discussed above.
[105] Ministry initial submission, at paras. 149-152.
[106] Order F15-36, 2015 BCIPC 39 (CanLII), at para. 29.

[92] Other relevant factors - Sections 22(2)(a) through (h) do not exhaust the list of relevant circumstances that should be considered when determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy. The applicant's knowledge of and connection to the information in dispute, the public availability of some of the information and the sensitivity of the information are also factors that should be considered.

Applicant's awareness of the personal information

[93] Previous orders have concluded that an applicant's existing knowledge of the personal information may be a circumstance that weighs towards disclosure.[107] Similarly, an applicant's close connection to the subject matter of the information may be a factor that favours disclosure.[108]

[94] It is clear from the Ministry's materials, including its submissions and the records provided for this inquiry (in particular, the pages and portions of records already provided to the applicant and submitted as part of this inquiry), that the applicant is already aware of a large amount of the information in dispute as it relates to the Ministry's involvement with his family. Most of the information the Ministry has withheld under s. 22 would not be novel to him as he was present for many of the events referenced and has already received communications from the Ministry about some of the same matters discussed in the records. I also note that in some cases, information withheld in some of the pages has already been provided to the applicant as part of the responsive records.[109]

[95] I find that the applicant's connection to the subject matter of the information in dispute and his existing knowledge of that information are factors that weigh in favour of disclosure.

Public availability of the personal information

[96] In Order 01-53, former Commissioner Loukidelis considered whether the fact that personal information is publicly known could also be a relevant circumstance. He said:

> At one end of the scale, if the applicant clearly knows what the requested personal information is, because it has somehow become common public knowledge, the fact that the information is already publicly known *may* favour disclosure, although other factors (including the nature of the personal information) will also have to be examined.[110]

[107] See Order F17-05, 2017 BCIPC 6 (CanLII) at para. 54; Order 04-33, 2004 CanLII 43765 (BC IPC), 2004 CanLII 43765 (BCIPC) at paras. 49-50.
[108] Order F16-38 2016 BCIPC 42 (CanLII) at para. 142.
[109] For example, page 712 discloses information that was withheld on a number of other pages.
[110] Order 01-53 2001 CanLII 21607 (BC IPC), at para. 77.

[97] As noted in the Ministry's submission, some of the personal information it has withheld is available to the general public through a report that was published by an office of the legislature.[111] In my view, the fact that the personal information the Ministry has withheld is available to the general public through other means is a factor that weighs in favour of the disclosure of that specific information.

Sensitivity of the personal information

[98] A number of previous orders have considered the sensitivity of the personal information when determining whether disclosure would be an unreasonable invasion of personal privacy under s. 22(1) of FIPPA.[112] In this case the information relates to investigations into the safety of children and includes interviews with third parties that reveal intimate details of their own experiences and their opinions about the experiences and well-being of others.

[99] While the applicant may know that a particular third party has spoken with the Ministry about a particular matter, he may not know what exactly was said. In my view, this information (in particular, any interview notes or summaries relating to the information provided by third parties) is sensitive. I find that this is a factor which weighs heavily in favour of withholding this type of information, even where the applicant may have a general idea of which third parties' were interviewed and the subject matter that was discussed.

Conclusion on s. 22(1)

[100] The issue under s. 22(1) of FIPPA is whether disclosure of the withheld information would be an unreasonable invasion of the personal privacy of a third party.

[101] I find some of the information withheld by the Ministry under s. 22 is not "personal information" and therefore s. 22(1) does not apply to it.

[102] As for the information that is third party personal information, some of it falls under s. 22(4)(e) because it is about third parties' functions as public body employees. In these cases disclosure is deemed not to be an unreasonable invasion of third party personal privacy and the Ministry is not authorized to refuse to disclose that s. 22(4)(e) personal information under s. 22(1).

[103] I find that that the ss. 22(3)(a), (b) and (d) presumptions against disclosure apply to some of the third party personal information. The s. 22(3)(a) presumption applies to a small amount of medical and psychological information

[111] Ministry initial submission, at para. 147.
[112] For example, Order F16-38 2016 BCIPC 42 (CanLII) at paras. 136-143; Order F10-09, 2010 BCIPC 14 (CanLII) at para. 123.

in the Ministry's online filing system and in some email correspondence. Having considered the above relevant circumstances, I find that the s. 22(3)(a) presumption has not been rebutted. This is sensitive information and although the applicant may have some prior knowledge of the information I nonetheless believe that disclosing it would be an unreasonable invasion of third party personal privacy and the Ministry must withhold it under s. 22(1).

[104] The s. 22(3)(b) presumption applies to some of the personal information which was compiled by the Ministry as part of investigations into child protection matters. I find that the presumption has been rebutted where the personal information relates to procedural steps taken by the Ministry in the course of its investigations where the applicant would already have been aware of the information being withheld. Specifically, information relating to the fact that the Ministry was conducting investigations that involved the applicant's family and dealing with matters related to the Youth's death. However, the presumption has not been rebutted where the information was provided by third parties to the Ministry as part of interviews about their opinions on the well-being of youth and others and the Ministry must refuse to disclose that information under s. 22(1).

[105] The 22(3)(d) presumption applies to a small amount of information related to a third party's employment history and training plan. Although the information is not particularly sensitive, I have seen no indication in the parties' submissions or the records that the applicant is aware of this information and I find that the presumption has not been rebutted. The Ministry must refuse to disclose this information under s. 22(1).

[106] For the balance of the information that did not fall within a 22(3) presumption, after considering all of the relevant factors in accordance with s. 22(2) I find that disclosure would not be an unreasonable invasion of third party personal privacy where the applicant and/or the general public are aware of the contents of the information and it is not sensitive. However, sensitive information, particularly information that relates to the deceased Youth but was provided by other third parties, would be an unreasonable invasion of third party personal information and must be withheld.

Child, Family and Community Services Act

[107] The Ministry says that it is withholding some of the information in dispute pursuant to ss. 77(1) and 77(2)(b) of the CFCSA.[113] The applicant made no submissions regarding the application of the CFCSA.

[113] As noted above, the Ministry also applied one or more sections of FIPPA to the same information it has applied sections of the CFCSA to. Where I have already found that that Ministry is authorized or required to withhold the information under FIPPA, I have not considered that information further.

Section 77(1)

[108] Section 77(1) specifies the following:

> A director must refuse to disclose information in a record to a person who has a right of access to the record under the Freedom of Information and Protection of Privacy Act if the disclosure could reasonably be expected to reveal the identity of a person who has made a report under section 14 of this Act and who has not consented to the disclosure.[114]

[109] The Ministry says that as a result of s. 77(1), it treats information about the identity of a person who has made a child protection report under s. 14 of the CFCSA as strictly confidential.[115] It submits that "it is clear on the face of the Records that the information it has withheld under s. 77(1) of the CFCSA constitutes information the disclosure of which could reasonably be expected to reveal the identity of a person who made a report under s. 14 of the CFCSA and who has not consented to the disclosure."[116] It referred to its *in camera* affidavit evidence for the page numbers where it says the identities of reporters would be revealed.[117]

[110] While I cannot disclose the information the Ministry provided *in camera,* I make the following distinction: Where the information in dispute names a person who has made a child protection report, or where it would otherwise reveal the identity of a person who made a report, I am satisfied that s. 77(1) applies. In most cases, I have already found that the Ministry must refuse to disclose this information pursuant to s. 22 of FIPPA.[118]

[111] However, in some instances the Ministry has applied s. 77(1) to information that does not reveal the identity of a person. On some pages the information does not refer to an individual and instead references another public body, agency, or other police body.[119] The Ministry's submission on the application of this section is vague and does not explain how the identity of a person could be revealed through the release of this type of information. As a result, I find that information which only reveals the name of public body, agency, or other police body does not meet the criteria set out in s. 77(1).[120]

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[114] Section 14 of the CFCSA requires a person who has reason to believe that a child needs protection from specific enumerated types of harm to make a report to the Ministry. A "director" is defined in the CFCSA as a person designated by the minister under s. 91 of that Act.
[115] Ministry initial submission, at para. 59.
[116] Ministry's initial submission, at para. 60.
[117] Affidavit of A.S., at paras. 7-8.
[118] For example, pages 159, 161, 232, 320, 322, 329, 333, 334, 651, 652, 654, 665, 655, 731, 732, 733, 735-737, 742, 756, 824, 835 and 843 (duplicates not listed).
[119] For example,pages 182-183, 229, 231-232, 329, 330, 331, 528, 655 and 732 (duplicates not listed).
[120] For example, pages 68, 230, 306, 330 and 529 (duplicates not listed).

[112] Based on my review of the information in dispute and the Ministry's submissions and evidence, there is some information that would reveal the identity of a person who made a child protection report.[121] I have already determined above that any FIPPA exceptions that the Ministry relied on to withhold this information do not apply. I find that the Ministry must not disclose this information pursuant to the s. 77(1) of the CFCSA.

Section 77(2)(b)

[113] Section 77(2)(b) says the following:

> A director may refuse to disclose information in a record to a person who has a right of access to the record under the Freedom of Information and Protection of Privacy Act if […]
>
> > (b) the information was supplied in confidence, during an assessment under section 16 (2) (b.1) or an investigation under section 16 (2) (c), by a person who was not acting on behalf of or under the direction of a director.[122]

[114] The Ministry says that it is authorized to withhold information under this section "as it relates to confidential interviews of third parties as well as additional information relating to the Ministry's assessment of safety of the Applicant's children or the Ministry's investigation."[123] The Ministry's affidavit evidence from the Deputy Director of Child Welfare reiterates this point.

[115] I have already found that the majority of the information relating to statements made by third parties to the Ministry during the course of interviews about child protection matters was properly withheld pursuant to s. 22(1) and as such, no further consideration of that information is necessary.

[116] It is unclear to me how most of the remaining information that the Ministry has applied this section to would reveal the type of information described in s. 77(2)(b). Many of the pages contain information from individuals who were "acting on behalf or under the direction of a director." In addition, the submissions and evidence provided by the Ministry do not explain where exactly s. 77(2)(b) applies and how it applies.[124]

[117] Nonetheless, I find that there is some information where it is evident that this section applies. The pages where I have found that s. 77(2)(b) applies

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[121] For example, pages 321, 332, 647, 726, 733, 758, 759, 771, 773, 823 and 839.
[122] Section 16 of the CFCSA sets out the steps a director must take to find out whether a child needs protection.
[123] Ministry initial submission, at para. 63.
[124] For example, pages 58, 140, 141, 146, 150, 165, 180, 182-183, 215, 678, 735-751 and 772 (duplicates not listed).

contain the name of a person who is not a Ministry employee as well as information that they clearly provided to the Ministry in relation to a child protection investigation or assessment of a child's safety. Given the sensitivity of the subject matter of the communications and the context, it is reasonable to assume that this information was supplied in confidence. In these limited circumstances, I find that the Ministry is authorized to withhold this information pursuant to s. 77(2)(b).[125]

Youth Criminal Justice Act

[118] The Ministry submits that it cannot disclose some of the information in dispute without contravening section 110 of the YCJA. Section 110 states:

> 110 (1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

[119] I do not need to consider the information that I have already concluded the Ministry is required or authorized to refuse to disclose under FIPPA exceptions as there can be no conflict between s. 110 and a disclosure order under FIPPA in those instances. However, where there is overlap between the application of s. 110 and my finding that FIPPA exceptions do not apply, s. 110 takes precedence.[126] This is because the YCJA is federal legislation and as such, any section of FIPPA that directly conflicts with the YCJA is inoperative due to the principle of federal paramountcy. That principle is explained as follows by former Commissioner Loukidelis in Order F04-01:

> The constitutional doctrine of federal paramountcy applies to the assessment of inconsistency, or conflict, between federal legislation, on the one hand, and provincial or local government legislation on the other. The relevant cases are *Multiple Access Ltd.* v. *McCutcheon*, 1982 CanLII 55 (SCC), [1982] 2 S.C.R. 161, *M & D Farm Ltd.* v. *Manitoba Agricultural Credit Corp.*, 1999 CanLII 648 (SCC), [1999] 2 S.C.R. 961, *114957 Canada Ltée (Spraytech, Société d'arrosage)* v. *Hudson (Town)*, 2001 SCC 40 (CanLII), [2001] 2 S.C.R. 241 and *Law Society of British Columbia* v. *Mangat*, 2001 SCC 67 (CanLII), [2001] 3 S.C.R. 113. The test applied in these cases is whether there is actual conflict in

[125] Pages 57, 158, 159, 184-185, 186, 321, 656 and 830 (duplicates not listed).

[126] I note that at paragraph 66 of its initial submission that Ministry also submits that because the YCJA is federal legislation, the Commissioner does not have jurisdiction over the YCJA-related severing. However, s. 56(1) of FIPPA gives the Commissioner, and his delegates, the authority to conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry. This includes, from time to time, questions about federal legislation and the principle of paramountcy. See for example: Order F12-14, 2012 BCIPC 20 (CanLII) at paras. 9-19; *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII) at para. 55 and 71.

> the operation of a provincial or local government law and a federal law such that the operation of the provincial or local government law displaces the legislative purpose of the federal law. If it is possible to comply with the provincial or local government law without frustrating the purpose of the federal law, then there is no conflict that triggers the constitutional paramountcy of the federal law. If dual compliance is not compatible with the federal legislative purpose, then the federal law takes precedence and the provincial or local government law is inoperative to the extent of the inconsistency between the laws.[127]

[120] Section 110 says "no person shall publish…". The term "publication" is defined in the YCJA as the communication of information by making it known or accessible to the general public through any means.[128] The Ministry says that s. 110 prohibits the parties or the Commissioner from making the information subject to this section known to the general public.[129] It also says that when making decisions about whether to disclose information pursuant to FIPPA, public bodies are entitled to assume that access under FIPPA "is effectively access to the world at large."[130] I understand the Ministry to be saying that ordering the release of the information in dispute to the applicant would meet the definition of publication under the YCJA. I agree with the Ministry that the definition of publication is broad enough to include the release of information through a FIPPA request.

[121] At the beginning of this inquiry, I requested submissions from the parties about whether the issues the Ministry raised regarding s. 110 might be moot as the parties' submissions indicated that some of the information was already available to the general public. Both parties provided an additional submission.

[122] I reviewed the parties' submissions and have concluded that the issue is not moot. I agree with the Ministry's submission that s. 110 remains in effect regardless of whether the information has been published by others. In my view, this position is supported by s. 138(1) of the YCJA which stipulates that "every person" who contravenes subsection 110(1) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years or is guilty of an offence punishable on summary convictions. In my view, the language of s. 138(1) makes it clear that it does not matter whether the contravener is the only person to publish the identity, nor does the section say that it is permissible to publish the identity if it has already been revealed.

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[127] 2004 CanLII 34255 (BC IPC) at para. 21.
[128] *Youth Criminal Justice Act*, section 2(1).
[129] Ministry initial submission, at para. 73.
[130] Ministry initial submission, at para. 16. See also, Order 03-35, 2003 CanLII 49214 (BC IPC).

[123] I have reviewed the remaining information to which the Ministry says s. 110 applies.[131] I agree that it could reveal the identity of third parties who were youth that have been dealt with by under the YCJA. As a result I find that this information must not be disclosed due to s. 110 of the YCJA.[132]

CONCLUSION

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

1. The Ministry is authorized to refuse to disclose the information it withheld under ss. 13, 14 and 15(1)(l).
2. Subject to paragraph 5 below, the Ministry is required to refuse to disclose to the applicant some of the information it withheld under s. 22 of FIPPA.
3. Subject to paragraph 5 below, the Ministry is required to refuse to disclose some of the information it withheld under ss. 77(1) and 77(2)(b) of the CFCSA.
4. Subject to paragraph 5 below, the Ministry is required to refuse to disclose some of the information it withheld under s. 110 of the YCJA.
5. In a copy of the records that I am sending to the Ministry, I have highlighted the only information that the Ministry is authorized and/or required to withhold under ss. 15(1)(l) and 22(1) of FIPPA, ss. 77(1) and 77(2)(b) of the CFCSA and s. 110 of the YCJA. The Ministry is not authorized to refuse to disclose the remaining information it withheld under those provisions.
6. I require the Ministry to give the applicant access to the information it is not authorized and/or required to withhold as ordered in paragraph 5 above by November 9, 2018. The Ministry must concurrently provide the OIPC Registrar of Inquiries with a copy of its cover letter and the records sent to the applicant.

September 27, 2018

ORIGINAL SIGNED BY

Meganne Cameron, Adjudicator

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[131] I have not considered the instances where the Ministry has applied s. 110 to information that I have already concluded may be withheld pursuant to FIPPA or the CFCSA.
[132] In order to minimize the possibility of contravening s. 110 of the YCJA through this order, I have not listed the pages where there is information that must be withheld pursuant to that section. I have severed the records accordingly and the information that the Ministry must withhold pursuant to s. 22 of FIPPA, the CFCSA or the YCJA is highlighted in yellow.