Order F19-38

MINISTRY OF FINANCE

Lisa Siew
Adjudicator

October 29, 2019

CanLII Cite: 2019 BCIPC 43
Quicklaw Cite: [2019] B.C.I.P.C.D. No. 43

Summary: An applicant requested access to records related to the Sunshine Coast Tourism Society's application for the implementation of the municipal and regional district tax in two regional districts. The Ministry of Finance (Ministry) withheld information in the records under several exceptions to disclosure under the *Freedom of Information and Protection of Privacy Act* (FIPPA). For some of the records, the Ministry applied one or more exceptions to the same information. The adjudicator determined the Ministry was authorized or required to withhold some information under ss. 12(1) (cabinet confidences), 13(1) (advice or recommendations) and 14 (solicitor client privilege), but ordered it to disclose the remaining information withheld under these sections to the applicant. The adjudicator also found the Ministry was not authorized or required to withhold information under ss. 16(1) (harm to intergovernmental relations) or 22(1) (unreasonable invasion of third party personal privacy).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 12(2), 13(1), 13(2), 14, 16(1)(a)(iii) and (b), s. 22 and s. 44; Schedule 1 definition of "aboriginal government."

INTRODUCTION

[1] An applicant requested the Ministry of Finance (Ministry) provide access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records related to the Sunshine Coast Tourism Society (the Society). The applicant requested records involving the Society's application to have the municipal and regional district tax (MRDT) apply to two particular regional districts. The applicant made three separate access requests to the Ministry for

this information, but for different time periods covering the total period of September 1, 2015 to October 7, 2016.[1]

[2] The Ministry responded to each access request and disclosed some information to the applicant at different stages of the access process, but it withheld information relying on ss. 12(1), 13(1), 14, 16(1)(a)(iii) and (b), 17, 21 and 22(1) of FIPPA. The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decisions. Mediation failed to resolve the issues in dispute and the applicant requested the matters proceed to inquiry. Thereafter, the Ministry released additional information to the applicant, but it continued to withhold other information.

[3] During the inquiry, the parties agreed to remove the information withheld under s. 21 (harm to third party business interests) from the scope of this inquiry. The Ministry also withdrew its reliance on s. 17 (harm to financial or economic interests of a public body) and it received permission from the OIPC to add s. 15 (harm to law enforcement) as an issue.

[4] In his inquiry submission,[2] the applicant says he is not interested in any of the information withheld by the Ministry under s. 15.[3] The applicant also says he is not interested in a portion of the information withheld under s. 22, specifically personal vacation information, phone numbers and emails.[4] Therefore, I will not consider this information or the information withheld under s. 15 as part of this inquiry since it is no longer in dispute.

ISSUES

[5] The issues I must decide in this inquiry are as follows:

1. Is the Ministry required to withhold the information in dispute under ss. 12(1) or 22(1) of FIPPA?

2. Is the Ministry authorized to withhold the information in dispute under ss. 13(1), 14 or 16(1)(a)(iii) and (b) of FIPPA?

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[1] The first access request is referred to by the Ministry as FIN-2016-62160, the second access request is referred to as FIN-2016-63904 and the third access request is referred to as FIN-2016-63848. I will use these references in discussing the records.

[2] Applicant's submission at para. 81.

[3] The Ministry applied s. 15 to a small amount of information consisting of the location and pathways for some electronic files. This information is located at FIN-2016-63848 (pp. 160, 162, 179).

[4] Applicant's submission at para. 81. This information is located at FIN-2016-62160 (pp. 25, 27, 86, 104, 111, 116, 118, 121); FIN-2016-63904 (pp. 18, 19, 55, 56); FIN-2016-63848 (pp. 2, 96, 126, 130, 131, 133, 210, 211, 219).

[6] Under s. 57(1) of FIPPA, the burden is on the Ministry to prove the applicant has no right of access to all or part of the records in dispute under ss. 12(1), 13(1), 14, and 16(1)(a)(iii) and (b) of FIPPA.

[7] On the other hand, s. 57(2) places the burden on the applicant to prove that disclosure of any personal information would not be an unreasonable invasion of a third party's personal privacy under s. 22. Previous OIPC orders have found, though, that a public body has the initial burden of proving that the information at issue is personal information under s. 22.[5]

DISCUSSION

Background

[8] The MRDT is a tax charged on the sales of taxable accommodation. It is commonly referred to as the hotel room tax. The MRDT is used primarily to raise revenue for local tourism marketing, programs and projects.[6] For the time period of the applicant's access request, the program was jointly administered by the Ministry of Finance, Destination British Columbia, and the Ministry of Jobs, Tourism, and Skills Training.[7]

[9] A municipality, regional district or eligible entity may apply to the Ministry for approval to have the tax program come into effect for a particular geographic area.[8] There are a number of application requirements that must be met, including documented evidence that "the majority of accommodation providers representing a majority of units of accommodation in the proposed designated accommodation area support the imposition of the tax."[9] Once an MRDT application is reviewed and approved, the Ministry submits an Order in Council to Cabinet for approval.[10]

[10] In August 2015, the Society submitted an application to the Ministry for the MRDT to be imposed in the Sunshine Coast Regional District and the Powell River Regional District. In December 2015, the Ministry approved the Society's application and an Order in Council enacting the tax for that area was scheduled for Cabinet consideration and approval.[11]

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[5] Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 9–11.
[6] Briefing Document dated March 14, 2016 located at pp. 3-10 of FIN-2016-62160 in Ministry's submission and Ministry of Finance Tax Bulletin - MRDT 001 in applicant's submission at appendix #2.
[7] Information found in record located at p. 3 of FIN-2016-63904.
[8] Ministry of Finance Tax Bulletin - MRDT 001 in applicant's submission at appendix #2.
[9] Document titled "347660 – Bullets for Minister of Finance" located at p. 1 of FIN-2016-62160.
[10] Ministry's submission at para. 24.
[11] Document titled "347660 – Bullets for Minister of Finance" located at p. 1 of FIN-2016-62160.

[11] Shortly after, the applicant wrote to the Minister of Finance providing retraction letters from several accommodation providers who previously supported the MRDT, thus reducing the required support for the Society's application.[12] The applicant also made several allegations about the legitimacy of the Society's application and the Ministry's approval.[13] The Ministry then put the Society's MRDT application on hold since it was not satisfied the Society had obtained the necessary level of support for its application.[14]

[12] The Society asked for reconsideration of their application and provided three new letters of support from other accommodation providers to meet the minimum application threshold.[15] The Ministry accepted and approved the Society's resubmission. In 2016, legislative amendments were made to add the Sunshine Coast Regional District and the Powell River Regional District as a designated accommodation area for the purpose of the MRDT program.[16]

Preliminary matter

[13] Most of the applicant's submission deals with challenging the validity of the Society's MRDT application and its approval. I have fully reviewed the applicant's submissions and his concerns; however, I will only refer to the parts of the applicant's submission that are applicable to the issues in this inquiry. As the adjudicator for this inquiry, it is not within my jurisdiction under FIPPA to determine whether the Society's MRDT application was properly submitted, reviewed and approved. I also do not have the statutory authority to grant the applicant's requested remedies such as the repayment of any MRDT collected by the Society.[17]

Records in dispute

[14] The Ministry is withholding information from approximately 268 pages of records. Some pages have been withheld in their entirety and others were disclosed with some information redacted.

[15] The records consist mostly of email chains and individual emails, but there are also memos, speaking notes, briefing notes, draft orders in council and drafting instructions related to the Society's MRDT application and its approval.

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[12] Briefing Document dated March 14, 2016 located at p. 10 of FIN-2016-62160.
[13] *Ibid* and applicant's December 9, 2015 letter to Minister of Finance in applicant's submission at appendix 5.
[14] Briefing Document dated March 14, 2016 at p. 5 of FIN-2016-62160.
[15] *Ibid* at p. 6 of FIN-2016-62160.
[16] Ministry's submission at para. 27 and Order in Council dated April 29, 2016, located at pp. 15-17 of FIN-2016-63904.
[17] Applicant's submission dated December 20, 2018.

Section 14 – solicitor client privilege

[16] The Ministry is withholding a large amount of the disputed information under s. 14; therefore, I will consider this exception first. For some of the records, the Ministry also applied one or more of ss. 12(1), 13(1) or 22(1) to the same information withheld under s. 14. I will only consider the other exceptions if I find s. 14 does not apply.

[17] 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 courts have determined that s. 14 encompasses legal advice privilege and litigation privilege.[18] The Ministry is claiming legal advice privilege over information it withheld in the disputed records.

[18] Legal advice privilege applies to confidential communications between solicitor and client for the purposes of obtaining and giving legal advice.[19] The courts and previous OIPC orders accept the following test for determining whether legal advice privilege applies:

> 1. there must be a communication, whether oral or written;
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> 2. the communication must be of a confidential character;
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> 3. the communication must be between a client (or his agent) and a legal advisor; and
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> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.
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> If these four conditions are satisfied then the communications (and papers relating to it) are privileged.[20]

[19] Courts have also found that solicitor client privilege extends to communications that are "part of the continuum of information exchanged" between the client and the lawyer in order to obtain or provide the legal advice.[21] The protection given to these communications ensures that the party seeking the

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[18] *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para. 26
[19] *Ibid* at paras. 26-31.
[20] *R v B*, 1995 CanLII 2007 (BC SC) at para. 22. See also Order F17-43, 2017 BCIPC 47 at paras. 38-39.
[21] *Huang v Silvercorp Metals Inc*., 2017 BCSC 795 at para. 83; *Camp Development Corporation v South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 [*Camp Development*] at paras. 40-46.

information is unable to infer the nature and content of the legal advice sought or received.[22]

The parties' position under s. 14

[20] The Ministry submits that it properly applied s. 14 to the disputed information and records because the information includes written communications between the Ministry and its lawyers, who were acting in a legal capacity, that were made in confidence and which were directly related to the seeking, formulating or giving of legal advice. The Ministry also claims that the attachments it withheld are privileged because they are part of privileged email chains.[23]

[21] The Ministry claims the records would reveal legal advice it received from four lawyers. Two of the lawyers (DP and LL) work for the Ministry of Justice's Legal Services Branch (LSB) and advise the Ministry's Revenue and Taxation Group. The third lawyer (KC) is also a LSB lawyer and she advises Ministry employees, LSB's Assistant Deputy Attorney General (ADAG) and LSB's correspondence unit. The fourth lawyer is from the legislative counsel office (Legislative Counsel).

[22] The applicant questions the impartiality and integrity of the legal advice provided to the Ministry. He alleges the Ministry directed its lawyers to provide a legal opinion which "exonerates" the Ministry in approving the Society's MRDT application.[24] The applicant requests full disclosure of the information withheld under s. 14 to subject the government's activities to public scrutiny.[25]

The records withheld under s. 14

[23] The Ministry chose not to provide the information that is in dispute under s. 14 for my review. Instead, it provided a records table for each of the three access requests, as well as affidavit evidence from two of the LSB lawyers (KC and DP) and a former Ministry employee identified in the records as a tax policy analyst (Policy Analyst).[26] The affidavits and the three tables provide a brief description of the records and their contents, the circumstances leading to the creation of the records and some of the dates and names of the people involved in the communications.

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[22] *British Columbia (Attorney General) v Lee*, 2017 BCCA 219 at para. 39, quoting *Camp Development* at para. 46.
[23] Ministry's submission at para. 103.
[24] Applicant's submission at paras. 77-78.
[25] *Ibid* at para. 78.
[26] In her affidavit, the Policy Analyst identifies herself as a former Ministry strategic advisor, but the records indicate her official job title was Tax Policy Analyst. For ease of reference, I refer to her as the Policy Analyst.

[24] The records at issue under s. 14 consist of individual emails,[27] email chains,[28] emails with attachments,[29] briefing notes,[30] memos,[31] drafting instructions,[32] draft orders in council[33] and two copies of a form titled "Order in Council - Cabinet Summary Information."[34] The Ministry withheld most pages in their entirety and others were disclosed with some information redacted.

Analysis and findings on s. 14

Records involving DP (revenue and taxation lawyer)

[25] There are a series of records that are described as emails between the Policy Analyst and DP about the seeking and giving of legal advice.[35] Some of these emails include other Ministry employees. There are also a number of related emails and documents where the Ministry says that DP's legal advice is shared with other Ministry employees.[36]

[26] DP says the Ministry sought and received legal advice from him and from LL and Legislative Counsel in evaluating the Society's MRDT application and obtaining the necessary legislative amendments.[37] He describes his role in that process:

> When considering a change to legislation or regulations, the Ministry first identifies the need for the change and then contacts the advising solicitor to assist in the process of changing the legislation in question. Having received the request from the Society to amend the Regulations, the Ministry evaluated the application and then contacted me for legal advice in my role as advising solicitor to the Ministry. My role consisted of reviewing the Ministry's drafting instructions and providing legal advice in that context, as well as on issues related to the amendments.[38]

[27] FIN-2016-62160 at pp. 70-74; FIN-2016-63904 at p. 43.
[28] FIN-2016-62160 at p. 77; FIN-2016-63904 at pp. 58-60, 72-74, 219-220, 234-236, 239-241, 256-258, 262-264; FIN-2016-63848 at pp. 146-147, 150, 155-157, 161-162.
[29] FIN-2016-62160 at pp. 70-74; FIN-2016-63904 at p. 82-218, 242-246; FIN-2016-63848 at p. 152; FIN-2016-63848 at p. 175-176.
[30] FIN-2016-62160 at pp. 6 and 8.
[31] FIN-2016-62160 at p. 12; FIN-2016-63848 at pp. 221, 234.
[32] FIN-2016-63848 at p. 153-154; FIN-2016-63848 at pp. 232-233, 235-236.
[33] FIN-2016-63848 at pp. 229-231, 237-239.
[34] FIN-2016-62160 at p. 19; FIN-2016-63848 at p. 226.
[35] FIN-2016-63904 (pp. 58-60, 72-74, 234-236, 239-241, 256-258).
[36] FIN-2016-63848 (pp. 175-176); FIN-2016-62160 (p. 6); FIN-2016-63904 (pp. 242-246, 262-264).
[37] Affidavit of DP at paras. 5-6 and 10.
[38] *Ibid* at para. 7.

DP explains that the Ministry sent drafting instructions to the legislative counsel office which were eventually assigned to Legislative Counsel.[39]

[27] DP says he reviewed all, but two, of the s. 14 records and affirms the Ministry's claim of privilege. He says that the information in the s. 14 records discloses confidential communications between him, Legislative Counsel and LL to their clients at the Ministry.[40] DP deposes that this s. 14 information discloses legal advice or relates directly to the formulating or giving of legal advice from him and the other government lawyers in their legal capacity.[41]

[28] I am satisfied legal advice privilege applies to some emails between the Policy Analyst and DP.[42] The Ministry provided evidence from DP, a lawyer directly involved in the communications, about the nature of the relationship between the parties involved, the general subject matter and the confidentiality of the communications.

[29] Based on the parties' submissions and information disclosed in some records, I can also determine that the Ministry was dealing with a number of issues regarding the Society's MRDT application. The context is one in which it is reasonable to assume that legal advice would be sought and given. Information disclosed in one of the emails also confirms DP was contacted to review the Ministry's drafting instructions.[43] Therefore, the description and context of the records satisfies me that the Ministry sought and received legal advice from DP on a number of issues related to the Society's MRDT application and approval.

[30] I also accept legal advice privilege applies to information in a briefing document and an email chain which the Ministry says reveals Ministry employees talking about legal advice from DP.[44] Past OIPC orders and the courts accept that the scope of solicitor client privilege may extend to communications between employees of a company or a ministry discussing previously obtained legal advice.[45] DP confirms he provided the legal advice discussed in these records.[46] The Ministry also disclosed information in the briefing document which assists me in confirming this record is an internal Ministry document. Based on the evidence before me, I accept that the Ministry employees in these records were

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[39] He references FIN-2016-63848 (pp. 152-154) as the relevant record in which the drafting instructions were sent to Legislative Counsel.
[40] Affidavit of DP at paras. 9-10.
[41] Affidavit of DP at para. 10.
[42] Records located at FIN-2016-63904 (pp. 234-236, 256-258).
[43] FIN-2016-63848 (p. 152).
[44] Ministry's initial submission at paras. 86-87; Briefing document located at FIN-2016-62160 (p. 6) and attached to an email at FIN-2016-63848 (p. 175). Email chain located at FIN-2016-63904 (pp. 262-264).
[45] *Bank of Montreal v Tortora*, 2010 BCSC 1430 at paras. 12-13 and, see for example, Order F17-23, 2017 BCIPC 24 at paras. 43-44.
[46] Affidavit of DP at para. 12.

discussing legal advice DP provided to the Ministry. I, therefore, conclude that disclosing the disputed information in the briefing document and the email chain would reveal information that is protected by solicitor client privilege.

[31] There are a number of records involving DP that are not like those above. I will address them below.

Email chain and attachment

[32] The s. 14 records include an email chain between the Policy Analyst and an LSB correspondence coordinator/writer, along with an attachment.[47] In this two-email chain, the Ministry withheld an attachment sent by the LSB correspondence coordinator to the Policy Analyst, but it disclosed what he said to her in his email. The Ministry also partially withheld the Policy Analyst's response on the basis she talks about DP's legal advice to the Ministry. DP confirms he provided the legal advice discussed by the Policy Analyst in this email.[48] I accept that legal advice privilege applies to the information withheld in the Policy Analyst's email because it could allow someone to accurately infer DP's legal advice to the Ministry.

[33] However, for the reasons that follow, I am not satisfied that legal advice privilege applies to the email attachment. The attachment is described in the records table as "draft correspondence the Ministry sought and received legal advice from LSB legal counsel, including [KC]." The Ministry does not provide any specific submissions on this record. Instead, the Ministry argues that attachments to a privileged communication are always privileged.[49] However, there is no presumption of privilege for attachments. Solicitor client privilege does not apply to all communications or documents that pass between a lawyer and their client.[50] Instead, solicitor client privilege may apply if the attachment reveals communications that are protected by privilege or would allow one to infer the content and substance of privileged advice.[51]

[34] In this case, the Ministry did not provide sufficient evidence to establish that the draft correspondence is a privileged communication between the Ministry and a lawyer or that it would reveal such information. The LSB lawyers and the Policy Analyst do not discuss this draft correspondence in their affidavits. The Ministry also does not explain how someone looking at the draft correspondence can infer what an LSB lawyer advised about the proposed correspondence and its contents.

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[47] FIN-2016-63904 (pp. 242-246).
[48] Affidavit of Revenue Lawyer at para. 12.
[49] Ministry's submission dated June 21, 2018 at paras. 95-97.
[50] *Keefer Laundry Ltd v Pellerin Milnor Corp et al,* 2006 BCSC 1180 at para. 61.
[51] *TransAlta Corporation v Market Surveillance Administrator*, 2014 ABCA 196 at para. 59; *Murchison v Export Development Canada*, 2009 FC 77 at para. 45; Order F18-19, 2018 BCIPC 22 at para. 40; Order F18-18, 2018 BCIPC 21 at paras. 36 and 39.

[35] Instead, based on information disclosed in the correspondence coordinator's email and the surrounding emails,[52] I can clearly determine that the attachment is correspondence prepared by the Ministry of Justice in response to an email directly from the applicant. In other words, it is the Ministry of Justice's response to the applicant on behalf of its own ministry. The attachment is not draft correspondence that was prepared for the Ministry of Finance by its lawyers. Instead, it is apparent that the Ministry of Justice is showing it to the Policy Analyst because she asked for an opportunity to review it. Therefore, I am not satisfied that the attachment would reveal the Ministry's privileged communication with its lawyers. As a result, I find that Ministry has not proven that s. 14 applies to the attachment.

Email chains that include unidentified government employees

[36] The records include three email chains described by the Ministry as ending with or including an email between DP and Ministry employee(s) where legal advice is sought from DP.[53] Based on the Ministry's evidence, I conclude the client in these communications is either the Ministry or a Ministry employee.[54] However, the Ministry says these communications also include employees from other government ministries.[55]

[37] I asked the Ministry for more information about the identity of these individuals and their role in these communications because their involvement raised issues about the confidentiality of the solicitor client communications. The Ministry declined to identify these non-Ministry employees or explain their roles in these communications.[56] The Ministry also says "it has already provided substantial explanation about the involvement of various ministries in the responsive records and how other ministries are involved in the Municipal and Regional District Tax."[57]

[38] Communications that include individuals outside of the solicitor client relationship do not typically attract privilege as their presence defeats the necessary requirement of confidentiality.[58] I have no evidence about the identity of these unidentified government employees, what role they played in the solicitor client relationship or what interest they had in the matters being discussed in these emails. In the records table, the Ministry only identified the Policy Analyst and DP as the email participants; there was no mention of any government employees from another ministry. There was also no affidavit

[52] FIN-2016-63904 at p. 242.
[53] FIN-2016-63904 (pp. 58-60, 72-74, 239-241).
[54] Affidavit of Revenue Lawyer at paras. 9-10.
[55] Ministry's letter dated December 12, 2018 at p. 3
[56] Ministry's letter dated December 12, 2018 at p. 3 and letter dated February 1, 2019 at p. 4-5.
[57] Ministry's letter dated February 1, 2019 at p. 4.
[58] Adam M. Dodek, *Solicitor-Client Privilege* (Ontario: LexisNexis Canada Inc., 2014) at §5.98; Order F18-38, 2018 BCIPC 41 at para. 42.

evidence that adequately described these records.[59] By refusing to identify all the participants in these communications, the Ministry has provided no evidence that these unaccounted individuals are from ministries involved in the MRDT process.

[39] The Ministry also argues that privilege applies to these communications because the "Province is one indivisible legal entity" and cites a number of authorities to support its position.[60] However, I do not find the authorities cited by the Ministry to be applicable or persuasive at this point because they deal with the waiver of solicitor client communications.[61] The initial issue for these communications that include non-Ministry employees is not waiver, but whether they are privileged in the first place. Waiver involves the disclosure of already privileged information which the Ministry has not established applies to these records.

[40] Ultimately, I find that there is insufficient explanation and evidence before me to support the Ministry's claim that these emails are confidential communications between a solicitor and a client, particularly since the Ministry chose not to identify all of the individuals involved in these communications or explain their roles or responsibilities in relation to these communications.

Records involving Legislative Counsel

[41] In the records table, the Ministry describes a series of emails between the Policy Analyst and Legislative Counsel as drafting instructions or draft orders in council sent to Legislative Counsel seeking her legal advice.[62] There is also an email chain between the Policy Analyst and Legislative Counsel described by the Ministry as "ongoing discussion of legal issue, including discussions with [DP]."[63] Also included in the records is a memo from Legislative Counsel to the Policy Analyst that is described by the Ministry as Legislative Counsel "providing her legal advice and seeking further instructions."[64] There are also a number of related emails and documents where Legislative Counsel's legal advice is shared with DP and other Ministry employees.[65]

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[59] At para. 16 of her affidavit, the Policy Analyst says another Ministry employee is a part of one of the email chains, but she does not identify any employees from another government ministry or discuss the other two records.
[60] Ministry's letter dated December 12, 2018 at p. 3 and letter dated February 1, 2019 at p. 4.
[61] Order F15-41, 2015 BCIPC 44, which cites the federal court decision of *Stevens v Canada (Prime Minister)*, [1997] 2 FC 759 and Ontario Order PO-2995, [2011] OIPC No. 126, which cites the federal court decision of *Canada v Central Cartage Co*., [1987] FCJ No. 345.
[62] FIN-2016-63848 at pp. 150, 232-233, 235-236; FIN-2016-62160 at pp. 70-74, also includes DP.
[63] FIN-2016-63848 at pp. 155-157. It is unclear if the Ministry means the email chains include prior emails from DP or that he is included in the emails.
[64] FIN-2016-63848 at p. 234.
[65] FIN-2016-62160 at p. 8 (briefing note), p. 12 (memo to Minister of Finance) and p. 19 (OIC - cabinet summary info). FIN-2016-63848 at pp. 152-154 (email to DP attaching copy of drafting instructions sent to Legislative Counsel), pp. 161-162 (email to Ministry employee), p. 176

[42] The Ministry relies on DP's assertions to establish that privilege applies to these records. DP was not personally involved in the communications between the Policy Analyst and Legislative Counsel, but he says he reviewed all the s. 14 records and claims they are confidential communications between a lawyer and a client that discloses legal advice.[66] DP does not explain, even in a general manner, the basis of his belief or what factors led him to form that opinion.

[43] As well, although most of the communications involve the Policy Analyst, she only addresses one particular record. She describes this record as an email she sent to Legislative Counsel and DP with a draft order in council attached.[67] The Policy Analyst says she sent the draft order in council to Legislative Counsel and DP for their review and comment.[68] The same record is described in the table of records as an email "seeking legal advice regarding OIC redrafting for Sunshine Coast MRDT."

[44] Despite the Ministry's limited evidence and submissions, previous decisions have found that legal advice privilege can apply to communications between a client ministry and legislative counsel regarding the drafting or amendment of legislation.[69] In Order F10-04, the adjudicator noted that the primary responsibility of legislative counsel is to draft bills, regulations and orders in council.[70] As well, in *British Columbia Teachers' Federation v. British Columbia*, Bauman, C.J. cited with approval, a decision of the Federal Court of Australia which determined that parliamentary counsel implicitly provides confidential legal advice to executive government during the drafting of legislation.[71]

[45] In this case, it is not in dispute that an order in council was passed to implement the MRDT in these regional districts. Based on the Policy Analyst's evidence, I also accept that she contacted Legislative Counsel as part of the order in council drafting process. Therefore, considering the circumstances and taking into account previous authorities, I conclude legal advice privilege applies to the communications between the Policy Analyst and Legislative Counsel regarding the order in council drafting process.

[46] I also find that privilege extends to the communications where Legislative Counsel's legal advice is shared with other Ministry employees. As previously

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(briefing note to Minister of Finance), p. 221 (memo to Minister of Finance) and p. 226 (OIC - cabinet summary info), pp. 229-231 and 237-239 (draft order containing legal advice).

[66] Affidavit of DP at para. 10.

[67] FIN-2016-62160 (pp. 70-74).

[68] Policy Analyst affidavit at para. 13.

[69] *British Columbia Teachers' Federation v British Columbia*, 2010 BCSC 961; Order F12-01, 2012 BCIPC 1 at para. 13; Order F10-04, 2010 BCIPC 6; Order 02-38, 2002 CanLII 42472 at paras. 154-159.

[70] Order F10-04, 2010 BCIPC 6 at para. 4.

[71] 2010 BCSC 961 at paras. 41-42.

noted, past OIPC orders and the courts accept that the scope of solicitor client privilege may extend to communications between employees of a ministry discussing previously obtained legal advice.[72] I find that to be the case here.

[47] As well, I accept that the Policy Analyst shared Legislative Counsel's legal advice with DP to obtain his legal advice as part of the order in council drafting process. DP explains that his role consisted of reviewing the Ministry's drafting instructions and providing legal advice in that context, as well as on issues related to the amendments.[73] Therefore, I find the disclosure of this information would reveal Legislative Counsel's legal advice and privileged communications with DP.

Email and attachments involving KC (the ADAG Lawyer)

[48] The records include an email between the Policy Analyst and LSB's correspondence coordinator/writer.[74] KC is copied on this email and she describes this record as a one-page email with numerous attachments totaling 146 pages.[75] These attachments are broadly described as draft correspondence that the Ministry sent to KC for the purpose of obtaining her legal advice and "numerous other related correspondences" sent to KC that led to the creation of the draft correspondence.[76]

[49] KC says the entire record is a "confidential written communication" that the LSB correspondence coordinator provided to her for the purpose of keeping her informed on a file where she previously gave legal advice to the Ministry.[77] She says the email and the attachments refer to and include draft correspondence she previously provided legal advice on.[78] She explains the attachments gave her the necessary context to provide legal advice regarding the draft correspondence.

[50] The Ministry claims "these communications would, if disclosed, allow an individual to draw accurate inferences as to legal advice sought or provided."[79] The Ministry also says this record was part of the continuum of communication between a lawyer and a client since it was sent to KC "to keep her informed on a matter on which she had provided legal advice."[80]

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[72] *Bank of Montreal v Tortora*, 2010 BCSC 1430 at paras. 12-13; See, for example, Order F17-23, 2017 BCIPC 24 at paras. 43-44.
[73] Affidavit of DP at para. 7.
[74] FIN-2016-63904 (pp. 82-218). LSB correspondence coordinator identified by KC in her affidavit at paras. 4 and 6.
[75] Affidavit of KC at para. 6.
[76] Description in records table and affidavit of KC.
[77] Affidavit of KC at para. 8.
[78] *Ibid* at paras. 6-9.
[79] Ministry's submission dated June 21, 2018 at para. 93.
[80] Ministry's December 12, 2018 letter at p. 1.

[51] I am not convinced that legal advice privilege applies to the email. The email in dispute is not between a lawyer and a client. It is a communication from the correspondence coordinator to the Policy Analyst about an attached draft correspondence. The Ministry's evidence is that KC was only copied on the email for information purposes. The courts are clear that an email does not become privileged simply by sending a copy of it to a lawyer.[81] The evidence must establish that the information was provided to the lawyer in a context where it is directly related to the seeking, formulating or giving of legal advice; it is not sufficient that the information is supplied just for the purposes of providing information to a lawyer, as was the case here.[82]

[52] The Ministry claims this record is part of the "continuum of communications" it had with its lawyer KC. A "continuum of communications" involves the necessary exchange of information between solicitor and client for the purpose of obtaining and providing legal advice such as "history and background from a client" or communications to clarify or refine the issues or facts.[83] It includes factual information provided by the client to the lawyer at the beginning or throughout the solicitor-client relationship and covers communications at the other end of the continuum, after the client receives the legal advice, such as internal client communications about the legal advice and its implications.[84]

[53] Except for citing a few authorities and some general assertions, the Ministry does not explain how this record fits within a continuum of communications between KC and the Ministry.[85] There is no evidence that further legal advice was being sought or provided on the draft correspondence. Instead, KC says she was copied on the email because she *previously* provided legal advice on the draft correspondence. Based on this evidence, I find that KC's communications with the Ministry for the purpose of seeking and providing legal advice on this matter had already concluded by the time this email was sent. Therefore, it is not clear how this email fits within a necessary exchange of information between KC and the Ministry for the purpose of obtaining and providing legal advice.

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[81] *Keefer Laundry Ltd. v Pellerin Milnor Corp.* 2006 BCSC 1180 at para. 61; *Humberplex Developments Inc. v TransCanada Pipelines Ltd*., 2011 ONSC 4815 at para. 49; *Imperial Tobacco Canada Limited v The Queen*, 2013 TCC 144 at para. 57.
[82] *Murchison v Export Development Canada*, 2009 FC 77 at para. 44; *Canada (Public Prosecution Service) v JGC*, 2014 BCSC 557 at paras. 16-19; *Belgravia Investments Ltd. v Canada*, 2002 FCT 649 at para. 46; Order F15-52, 2015 BCIPC 55 at para. 14.
[83] *Camp Development* at para. 40.
[84] *Bilfinger Berger (Canada) Inc. v Greater Vancouver Water District*, 2013 BCSC 1893 at paras. 22-24.
[85] Ministry's submission dated June 21, 2018 at paras. 81-85 and letter dated December 12, 2018 at pp. 4-5.

[54] The Ministry also does not discuss how the authorities it relies on apply to this specific record. The Ministry cites Order 00-38 and Order F14-35 for the principle that "all information provided by the client to the lawyer for purposes of obtaining legal advice is also privileged."[86] I, generally, do not disagree with that statement of the law; however, the facts regarding this specific record is not the same as in those other decisions. The Ministry's evidence does not establish that this is a record that was provided by a client to a lawyer for the purposes of obtaining legal advice.

[55] The Ministry also cites Order F10-20 for the proposition that s. 14 can apply to emails where a lawyer was simply copied on an email.[87] However, the adjudicator in Order F10-20 had the benefit of seeing the records and was satisfied that the information at issue was clearly part of ongoing communications between a lawyer and client or that its disclosure would reveal legal advice.[88] In this case, for the reasons previously given, I am not persuaded by the Ministry's evidence that the email is a part of a continuum of communications between a solicitor and a client that directly relates to the seeking, formulating or providing of legal advice.

[56] I also find there is insufficient evidence to establish that disclosing the email would reveal legal advice or allow someone to accurately infer any legal advice. There is no evidence that the email contains or discusses KC's legal advice to the Ministry. The Ministry also does not explain how someone looking at the email can accurately infer what KC advised the Ministry about the draft correspondence or any of the other documents. Therefore, considering all the evidence before me, I am not satisfied that legal advice privilege applies to the email.

[57] As for the attachments to this email, KC says the attachments include draft correspondence she previously provided legal advice on.[89] KC explains her responsibilities in reviewing and approving correspondence for the Office of the Assistant Deputy Attorney General to ensure the correspondence is responsive, "legally accurate and complete" and "ready for sign-off."[90] I accept that this draft correspondence was at one time forwarded to KC for the purpose of seeking her legal advice. I also accept that the rest of the attachments were forwarded to KC for the purpose of obtaining her legal advice on the draft correspondence. I conclude, therefore, that privilege applies to the attachments because their disclosure would reveal, or allow someone to accurately infer, what KC was specifically asked to advise on.

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[86] Ministry submission dated June 21, 2018 at paras. 83-84; Order F14-35, 2014 BCIPC 38; Order 00-38, 2000 CanLII 14403 at p. 14.
[87] Ministry's submission dated June 21, 2018 at para. 85. Order F10-20, 2010 BCIPC 31 at para. 14.
[88] Order F10-20, 2010 BCIPC 31 at paras. 12-14.
[89] Affidavit of KC at paras. 6-9.
[90] *Ibid* at paras. 3-5.

[58] For the reasons given, I conclude the Ministry may not withhold the email between the LSB correspondence coordinator and the Policy Analyst, but it may withhold the attachments to this email under s. 14.

Email involving LL (other revenue and taxation lawyer)

[59] In the records table, the Ministry describes one of the s. 14 records as "Email chain including email dated July 14, 2016 between [LSB correspondence coordinator], [Ministry employee] and [LL], LSB legal counsel, seeking and discussing legal advice regarding appropriate response for Ministry."[91] There was no evidence from any of the individuals who participated in this email chain as to the nature or confidentiality of these particular records.

[60] Further, DP's affidavit provides general evidence about the s. 14 information, but he does not specifically address this email chain in his affidavit. Instead, he generally claims that the s. 14 records include emails that reveal confidential legal advice the Ministry received from LL.[92] However, other than saying his views are based on his review of the s. 14 information, DP does not explain or identify what factors led him to form the opinion that what he was reviewing in these emails was legal advice or that the communications were intended to be confidential.

[61] I offered the Ministry two opportunities to provide further information to support its claim of privilege; however, the Ministry declined to do so.[93] The Ministry said absent any evidence to the contrary, DP's sworn evidence about the nature and confidentiality of the records is a sufficient basis to establish that they are privileged.[94] I disagree with the Ministry's position. Past OIPC orders have held that an affiant's assertion that a communication is privileged is not sufficient on its own to establish that fact.[95] Courts have also said that it is open to a decision maker to refuse to accept a lawyer's opinion, when it is unsupported by evidence, on a matter in controversy at an inquiry.[96]

[62] The onus of establishing that privilege applies to these communications rests with the Ministry. I am mindful of the importance of solicitor client privilege; however, a public body runs the risk of not meeting the required burden when it relies on unsupported assertions, fails to adequately describe the records or does not provide sufficient evidence in support of its claim.[97] I find this is what

[91] FIN-2016-63904 (pp. 219-220).
[92] Affidavit of DP at para. 10.
[93] Ministry's letters dated December 12, 2018 and February 1, 2019.
[94] Ministry's letter dated December 12, 2018.
[95] Order F19-14, 2019 BCIPC 16 at para. 38.
[96] *Nanaimo Shipyard Ltd. v Keith et al*, 2007 BCSC 9 at para. 29, quoted in Order F19-14, 2019 BCIPC 6 at para. 38.
[97] *Newfoundland and Labrador (Justice and Public Safety) (Re)*, 2019 CanLII 80273 (NL IPC) at paras. 29-30.

has occurred with respect to this email chain. Without more, I am not persuaded that legal advice privilege applies to this record. The Ministry's general assertions regarding privilege and its insufficient affidavit evidence do not satisfy its burden under FIPPA.

Waiver

[63] The issue of waiver arises regarding four email chains where the Policy Analyst discusses previously received legal advice with an employee from another government ministry.[98] For example, the Policy Analyst discusses Legislative Counsel's legal advice with an employee from the Ministry of Community, Sport and Cultural Development, who then shares it with an employee from the Building and Safety Standards Branch.[99] The question is whether the Ministry waived privilege by sharing its legal advice outside the Ministry.

[64] The Ministry argues that it has not waived privilege by sharing legal advice with government employees who work outside the Ministry because "the Province is a single, indivisible entity."[100] It claims its "assertion of privilege over email chains that include government employees from outside of the Ministry is equally valid as its claim over email chains solely between the Ministry's lawyer(s) and Ministry employees."[101]

[65] Typically, when a client shares or allows legal advice to be shared with others who are not part of the solicitor client relationship, this disclosure may amount to a waiver of privilege. Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege, and (2) voluntarily demonstrates an intention to waive that privilege.[102] However, waiver may also occur in the absence of an express intention to waive where fairness and consistency so require. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege.[103]

[66] In this case, there is not enough evidence for me to conclude the Ministry expressly or implicitly waived privilege when it shared its legal advice with non-Ministry employees. Given the importance of solicitor client privilege, there must

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[98] FIN-2016-63848 (pp. 146-147); FIN-2016-62160 (pp. 77) and FIN-2016-63904 (p. 43 and pp. 242-246).
[99] Record located at FIN-2016-63904 (p. 43). The Building and Safety Standards Branch is a branch of the Office of Housing and Construction Standards in the Ministry of Municipal Affairs and Housing.
[100] Ministry's submission dated June 21, 2018 at para. 107.
[101] *Ibid*.
[102] *S&K Processors Ltd. v Campbell Ave. Herring Producers Ltd.,*1983 CanLII 407 (BCSC) at para. 6.
[103] *Ibid* at para. 10.

be a clear intention to forego the privilege or that intention may be implied where there is some manifestation of a voluntary intention to waive the privilege.[104] Although the Ministry's evidence and submissions about these records are limited, I am unable to conclude in this case that there was a waiver of privilege for the legal advice discussed in these four email chains.

Summary of information that cannot be withheld under s. 14

[67] To summarize, the Ministry has established that s. 14 applies to most of the information at issue, with the exception of the information found on the following pages:

- FIN-2016-63904 at pages 243-246 (the draft correspondence attached to the email);
- FIN-2016-63904 at page 82 (the one page email between the Policy Analyst and the correspondence coordinator); and
- FIN-2016-63904 at pages 58-60, 72-74, 219-220 and 239-241.

Section 12(1) - cabinet confidences

[68] Section 12(1) of FIPPA requires a public body to withhold information that would reveal the substance of deliberations of Executive Council (also known as Cabinet) and any of its committees. Section 12(1) specifically includes any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

[69] The purpose of s. 12(1) is to protect the confidentiality of the deliberations of Cabinet and its Committees, including committees designated under s. 12(5).[105] Past OIPC orders and court decisions have recognized the public interest in maintaining Cabinet confidentiality to ensure and encourage full discussion by Cabinet members.[106]

[70] Determining whether information is properly withheld under s. 12(1) involves a two-part analysis. The first question is whether disclosure of the

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[104] *S. & K. Processors Ltd*. *v Campbell Ave. Herring Producers Ltd.,*1983 CanLII 407 (BCSC) at paras. 6 and 10; Order 17-35, 2017 BCIPC 37 at paras. 55-57; *Hallman Estate (Re)*, 2009 CanLII 49643 (ON SC) at paras. 14-16.

[105] *British Columbia (Attorney General) v British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 at para. 92.

[106] Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 69-70. *Babcock v Canada (Attorney General)*, [2002] S.C.J. No. 58, 2002 SCC 57 at para. 18 (McLachlin C.J.'s comments were made in regards to federal legislation, but previous OIPC orders recognize its applicability to interpreting s. 12 of FIPPA: see, for example, Order 02-38 at para. 69).

withheld information would reveal the "substance of deliberations" of Cabinet or any of its committees. In *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)* [*Aquasource*], the BC Court of Appeal held that "substance of deliberations" refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision.[107] According to *Aquasource*, the appropriate test under s. 12(1) is whether the information sought to be disclosed forms the basis for Cabinet or any of its committee's deliberations.[108] I am bound by this interpretation of s. 12(1).

[71] The second step in the s. 12 analysis is to decide if any of the circumstances under s. 12(2) applies. If so, then the information cannot be withheld under s. 12(1).

The records withheld under s. 12(1)

[72] The Ministry submits that s. 12(1) applies to some or all of the information in the following records:

- A memo to the Minister of Finance from the Deputy Minister of Finance regarding the proposed OIC.[109]

- Two copies of a document prepared by a Ministry employee which consists of speaking points for the Minister of Finance to present to Cabinet on the OIC.[110]

- Two draft versions of a form titled "Order in Council - Cabinet Summary Information", both of which are filled out, but left unsigned.[111]

The parties' position on s. 12(1)

[73] The Ministry submits it has properly applied s. 12(1) since disclosing the information at issue would reveal the substance of Cabinet's deliberations, specifically the information and materials Cabinet considered in approving the Order in Council.[112] The Policy Analyst explains that the disputed records relate

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[107] *Aquasource Ltd. v British Columbia (Freedom of Information and Protection of Privacy Commissioner),* 1998 CanLII 6444 (BC CA) [*Aquasource*] at para. 39.
[108] *Ibid* at para. 48.
[109] Record located at FIN-2016-63848 (pp. 206-207, the Ministry also applied s. 13).
[110] Record located at FIN-2016-62160 (pp. 14-16, the Ministry also applied s. 13); this same document is also attached to an email located on pages 164-166 of FIN-2016-63848 (the Ministry also applied s. 13).
[111] Record located at FIN-2016-62160 (pp. 17-18, 20-21) and FIN-2016-63848 (pp. 224-225, 227-228).
[112] Ministry's submission dated June 21, 2018 at paras. 40-43 and affidavit of Policy Analyst at paras. 13-15.

to the Ministry's work in reviewing the Society's MRDT application and preparing briefing materials for the Minister to present at Cabinet.[113]

[74] The Ministry also claims some of the withheld information was prepared for submission to Cabinet or would "allow the drawing of accurate inferences of the information Cabinet considered and thus would reveal the substance of deliberations of [Cabinet]."[114] The Policy Analyst explains that certain documents are draft versions of documents that were considered by Cabinet or contain information that is substantially similar to what was presented to Cabinet.[115]

[75] For example, she clarifies that the Cabinet Summary Information forms at issue are draft versions, but a final and signed version of this form was provided to Cabinet.[116] She also describes instances where, although the document itself was not considered by Cabinet, the information in these documents was ultimately presented to Cabinet.[117] The Policy Analyst also says the information at issue does not qualify as "background explanations or analysis" under s. 12(2)(c) because she believes this information "relates directly to documents created for and deliberated on by Cabinet."[118]

[76] The applicant questions the reliability of the Ministry's affidavit evidence and submits that the public has a right to know how Cabinet is being advised.[119] His concerns are based on his belief that the Society's MRDT application was illegally reviewed and approved.

Section 12(1): substance of deliberations

[77] I accept that disclosing the information withheld under s. 12(1) would reveal information considered by Cabinet or allow an accurate inference about that information. I can tell from reviewing the information in some of the records that materials were prepared to assist the Minister of Finance in presenting the proposed Order in Council to Cabinet. The Policy Analyst also deposes that the Minister of Finance did appear before Cabinet to speak on the matter.[120] Further, the Ministry provided a copy of the signed and approved Order in Council which indicates materials were submitted for Cabinet's consideration and approval on

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[113] Affidavit of Policy Analyst at paras. 11-13.
[114] Ministry's submission dated June 21, 2018 at para. 43. In its submission, the Ministry says disclosing the withheld information "would reveal the substance of deliberations of a Cabinet committee"; however, I assume it means "the deliberations of Cabinet" and not a committee since there is no assertion or evidence which suggests any of the withheld information was considered or prepared for submission to a Cabinet committee.
[115] Affidavit of Policy Analyst at para. 13.
[116] *Ibid*.
[117] *Ibid*.
[118] *Ibid* at para. 14.
[119] Applicant's submission at paras. 75 and 85.
[120] Affidavit of Policy Analyst at para. 11.

this matter.[121] I am, therefore, satisfied that the Minister of Finance appeared before Cabinet and provided some of the disputed information to Cabinet for their consideration.

[78] Previous OIPC orders have also concluded that s. 12(1) applied because the information at issue was the "same or substantially similar" to information in documents that were subsequently submitted to, and considered by, Cabinet or a committee.[122] In this case, I accept that some of the information at issue is substantially similar to the body of information which Cabinet considered when it approved the Order in Council. For example, I find disclosing the draft versions of the "Cabinet Summary Information form" would reveal the same or similar information in the final signed version of this form considered by Cabinet.

Section 12(2)(c): background explanations or analysis

[79] I have considered the circumstances under s. 12(2) and find s. 12(2)(c) is a relevant circumstance in this case. Section 12(2)(c) states the following:

> (2) Subsection (1) does not apply to
> …
>
> (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
>
> (i) the decision has been made public,
>
> (ii) the decision has been implemented, or
>
> (iii) 5 or more years have passed since the decision was made or considered.

[80] Previous OIPC orders have found that background explanations "include, at least, everything factual that Cabinet used to make a decision" and analysis "includes discussion about the background explanations, but would not include analysis of policy options presented to Cabinet."[123] However, any information of a factual nature which is interwoven with any advice, recommendations or policy considerations would not be considered "background explanations or analysis" under s. 12(2)(c).[124]

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[121] Order in Council 253/2016 attached as Exhibit "A" to affidavit of former Ministry employee.
[122] Order F09-26, 2009 CanLII 66959 (BC IPC) at paras. 21-23.
[123] Order No. 48-1995, July 7, 1995 at p. 12. The Court in *Aquasource* confirmed that Order No. 48-1995 correctly interpreted s. 12(2)(c) in relation to s. 12(1). Other BC Orders that have taken the same approach include Order 01-02, 2001 CanLII 21556 (BC IPC).
[124] Order No. 48-1995, July 7, 1995 at p. 13 and *Aquasource*, *supra* note 107 at para. 49.

[81] I find some of the information withheld under s. 12(1) consists of factual information about the Society's MRDT application and includes some discussion about that factual content. This information is located in a document that consists of speaking notes for the Minister of Finance.[125] In my view, the purpose of this information is to provide background explanations or analysis on the proposed Order in Council. This information does not include nor is it interwoven with advice, recommendations, policy considerations or analysis of policy options. Therefore, I find this withheld information qualifies as "background explanation and analysis" under s. 12(2)(c).

[82] For s. 12(2)(c) to apply, in addition to being "background explanations or analysis", one of the following must also apply: (i) the decision has been made public, (ii) the decision has been implemented, or (iii) 5 or more years have passed since the decision was made or considered. In this case, I find the circumstances in both s. 12(2)(c)(i) and (ii) apply.

[83] It is a matter of public record that the BC government approved the proposed Order in Council and amended the legislation to reflect Cabinet's approval of the Society's MRDT application. A review of the *Designated Accommodation Area Tax Regulation* reflects these changes.[126] It is also public knowledge that the MRDT is now being collected by accommodation providers in the Sunshine Coast and Powell River Regional Districts.[127] As a result, I am satisfied that Cabinet's decision was implemented and made public. Therefore, I find that s. 12(2)(c) applies to the factual information located in the speaking notes and this information cannot be withheld under s. 12(1).

Section 13 - Advice or Recommendations

[84] Section 13(1) authorizes the head of a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. Previous OIPC orders recognize that s. 13(1) protects "a public body's internal decision decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations."[128]

[85] To determine whether s. 13(1) applies, I must first decide if disclosure of the withheld information would reveal advice or recommendations developed by or for a public body or minister. Numerous orders and court decisions have considered the interpretation and meaning of "advice" and "recommendations"

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[125] Information withheld on pp. 14-16 of FIN-2016-62160. This same information was also withheld on pp. 164-166 of FIN-2016-63848.
[126] BC Reg 93/2013. The changes are reflected at section 5(1.1) and schedule 2.1.
[127] Applicant's submission dated December 20, 2018.
[128] Order 01-15, 2001 CanLII 21569 at para. 22.

under s. 13(1) and similar exceptions in the freedom of information legislation of other Canadian jurisdictions.[129]

[86] I adopt the principles identified in those cases for the purposes of this inquiry and have considered them in determining whether s. 13(1) applies to the information at issue. I note, in particular, the following principles from some of those decisions:

- A public body is authorized to refuse access to information under s. 13(1), not only when the information itself directly reveals advice or recommendations, but also when disclosure of the information would enable an individual to draw accurate inferences about any advice or recommendations.[130]

- Recommendations include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised and can be express or inferred.[131]

- "Advice" has a broader meaning than the term "recommendations."[132] Advice also includes an opinion that involves exercising judgement and skill to weigh the significance of matters of fact, including expert opinion on matters of fact on which a public body must make a decision for future action.[133]

- Section 13(1) extends to factual or background information that is a necessary and integrated part of the advice.[134] This includes factual information compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body.[135]

[87] If I find s. 13(1) applies, I will then consider if any of the categories listed in ss. 13(2) or (3) applies. Sections 13(2) and (3) identify certain types of records and information that may not be withheld under s. 13(1), such as factual material

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[129] See, for example: *College of Physicians of BC v British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665; Order 02-38, 2002 CanLII 42472; Order F17-19, 2017 BCIPC 20; Review Report 18-02, 2018 NSOIPC 2 at para. 14.
[130] Order 02-38, 2002 CanLII 42472 at para. 135. See also Order F17-19, 2017 BCIPC 20 at para. 19.
[131] *John Doe v Ontario (Finance)*, 2014 SCC 36 at paras. 23-24.
[132] *Ibid* at para. 24.
[133] *College*, *supra* note 129 at para. 113.
[134] *Insurance Corporation of British Columbia v Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52-53.
[135] *Provincial Health Services Authority v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94.

under s. 13(2)(a) and information in a record that has been in existence for 10 or more years under s. 13(3).

The records withheld under s. 13(1)

[88] The Ministry is relying on s. 13(1) to withhold information from individual emails and email chains and in two briefing documents to the Minister of Finance.[136] There was also some overlap between the Ministry's application of ss. 12(1) and 13(1). I will only consider the application of s. 13(1) to the information that I determined could not be withheld under s. 12(1) (i.e., information in the speaking notes).[137]

The parties' position on s. 13

[89] The Ministry submits that disclosing the information withheld from these records would reveal advice and recommendations developed by or for the Ministry.[138] It says most of the s. 13(1) information is advice and recommendations from Ministry employees to other Ministry employees and executives. However, the Ministry notes that there are some instances where individuals in other ministries, who were involved in the Society's MRDT process, were also giving advice and recommendations to the Ministry.

[90] The Ministry also claims that the information withheld under s. 13(1) does not fall under any of the categories listed under s. 13(2) or s. 13(3). In particular, the Ministry says s. 13(2)(a) does not apply because any s. 13(1) information "that may be considered factual material is inextricably interwoven with and integral to the Ministry's advice and recommendations" and cannot be reasonably severed.[139] The Policy Analyst discusses some of the records and information withheld under s. 13(1). Her descriptions generally categorize this information as "advice and recommendations" in support of the Ministry's assertions.[140]

[91] The applicant does not appear to dispute that advice was given or received by Ministry employees, but he questions the reliability of that advice given his views on the legitimacy of the Society's MRDT application.[141]

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[136] Records located at FIN-2016-62160 (pp. 25 and 27), FIN-2016-63904 (pp. 55, 58, 75-76, 81) and FIN-2016-63848 (pp. 96, 123, 124, 128-129, 141-142, 167, 170-171, 213, 215, 216-217). Briefing documents located at FIN-2016-62160 (p. 2) and at FIN-2016-63904 (p. 7).
[137] Information located on p. 14-16 of FIN-2016-62160 and p. 164-166 of FIN-2016-63848.
[138] Ministry's submission dated June 21, 2018 at paras. 53-54.
[139] Ministry's submission dated June 21, 2018 at para. 59.
[140] Affidavit of Policy Analyst at para. 16.
[141] Applicant's submission at paras. 74-75.

Analysis and findings on s. 13(1)

Information that qualifies as advice or recommendations

[92] There is some information withheld in four email chains and a briefing document which I find consists of advice and recommendations for the purposes of s. 13(1). I am satisfied the information withheld from the briefing document consists of advice and recommendations from Ministry employees to the Minister of Finance about what to do about the retractions of support from accommodation providers in the Sunshine Coast for the MRDT.[142]

[93] As for the four email chains, the Policy Analyst explains who was involved in the emails and the purpose of the emails.[143] These email chains are described as communications between Ministry employees or with other government employees. I am satisfied that part of the information withheld in an email consists of a recommendation by a public body employee to other employees on a proposed response on some correspondence.[144]

[94] I find all of the information withheld in an attachment to another email consists of advice from a Ministry employee to another government employee about wording on a briefing note for a minister.[145] Previous OIPC orders have found advice and recommendations regarding the content and wording of documents may be withheld under s. 13(1).[146] I find that to be the case here since the suggestions change the substance of what is communicated in the briefing note.

[95] I also find the information withheld in two emails between Ministry employees is advice or recommendations about a suggested meeting and a specific action that needs to occur if the order in council goes to Cabinet.[147] There is also information in several emails which I conclude consists of Ministry employees and executives providing advice and recommendations to each other about what to tell the Society about a delay in their MRDT application and what to do about an issue with that application.[148]

[96] I have considered whether any of the factors under ss. 13(2) or (3) applies to the information that I find qualifies as advice or recommendations under

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[142] Record located at FIN-2016-62160 (p. 2) and affidavit of Policy Analyst at para. 16.
[143] Affidavit of Policy Analyst at para. 16.
[144] Only the information withheld at the bottom of p. 76 of FIN-2016-63904.
[145] Page 7 of FIN-2016-63904.
[146] Order F14-44, 2014 BCIPC 47 at para. 32 and Order F18-41, 2018 BCIPC 44 at para. 29.
[147] Pages 25 and 27 of FIN-2016-62160.
[148] FIN-2016-63848 (p. 123, info repeated on p. 124, 128-129, 213, 215 and 216-217) and FIN-2016-63848 (p. 128, info repeated on p. 216). The Ministry disclosed information in these emails that reveals the topic of the advice and recommendations.

s. 13(1) and conclude that neither s. 13(2) nor s. 13(3) applies. Therefore, I conclude the Ministry is authorized to withhold this information under s. 13(1).

Information that does not qualify as advice or recommendations

[97] There is some information being withheld by the Ministry which I find does not qualify as advice or recommendations under s. 13(1). Some of the withheld information consists of factual information that is not an integrated part of any advice or recommendations. The information withheld in some speaking notes for the Minister of Finance consists of factual information about the Society's MRDT application and includes some discussion about that factual content.[149] I also find the information withheld from a portion of an email between employees of the Ministry of Jobs, Tourism and Skills Training is factual background information on some proposed correspondence.[150] As well, the information withheld in an email chain between the Policy Analyst and an employee from the Ministry of Jobs, Tourism and Skills Training consists of factual information and an explanation on the purpose of the proposed order in council.[151] I do not find any of this withheld information reveals, or is an integrated part of, any advice or recommendations.

[98] I also conclude that the following information withheld in the records does not qualify as advice or recommendations for the purposes of s. 13. Specifically, the information withheld from an email chain between the Policy Analyst and another Ministry employee that consists of the Policy Analyst sharing some information and letting the other employee know about a task she will complete.[152] The Ministry is also withholding part of a question posed in an email between the Policy Analyst and an employee from the ministry of Jobs, Tourism and Skills Training, along with the Policy Analyst's response.[153] The information withheld in an email chain between the Policy Analyst and another ministry employee also consists of a reporting and confirmation about some facts and actions.[154] I conclude none of the information withheld from these records reveals any advice or recommendations.

[99] I also conclude some handwritten notes made by the Minister of Jobs, Tourism and Skills Training on a draft letter addressed to the applicant is not advice or recommendations since it only reveals what instructions the Minister, as a decision-maker, gave to staff on some proposed correspondence.[155]

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[149] FIN-2016-62160 (pp. 14-16, with information repeated on pp. 163-166 of FIN-2016-63848).
[150] FIN-2016-63904 (p. 75 and top of p. 76).
[151] FIN-2016-63848 (pp. 170-171).
[152] FIN-2016-63904 (p. 55).
[153] FIN-2016-63848 (p. 141-142). I also note that all of the information withheld on p. 142 was disclosed by the Ministry elsewhere in the records.
[154] FIN-2016-63848 (p. 167).
[155] FIN-2016-63904 (p. 81).

Directions to staff from management or from a decision maker does not qualify as advice or recommendations under s. 13(1).[156]

[100] There is also information withheld in an email chain between the Policy Analyst and a Destination BC employee where the Policy Analyst is asked to do a preliminary review of the Society's MRDT application.[157] I find none of this information reveals advice or recommendations to a decision maker, nor could any advice or recommendations be inferred from this information.

[101] I conclude the Ministry is not authorized to withhold the information that I find does not reveal advice or recommendations under s. 13(1). Given my findings above, I do not need to consider whether ss. 13(2) or (3) applies. However, for one record, the Ministry also applied s. 16 to the same information withheld under s. 13(1).[158] I will therefore later consider whether this information can be withheld under that exception.

Section 13(1) information also withheld under s. 14

[102] Along with s. 14, the Ministry applied s. 13(1) to information withheld in an email chain.[159] As previously noted, the Ministry failed to prove that s. 14 applies to this particular record. During the inquiry, I asked the Ministry to provide the withheld information for my review; however, it declined to do so on the basis s. 14 also applies.[160] Obviously, without being able to see the redacted information, it is not possible for me to assess the Ministry's claim that s. 13(1) applies.

[103] Given the unique importance of solicitor client privilege to the legal system, the OIPC may make determinations about s. 14 without seeing the records and accept other evidence to decide a section 14 claim. However, the same considerations do not apply for s. 13 or the other FIPPA exceptions because they do not hold the same legal status or engage the same concerns as solicitor client privilege. Therefore, except for s. 14, where a public body decides not to provide the information in dispute for review, the public body will not have discharged its burden of proof under FIPPA.[161] I find that to be the case here.

[104] By refusing to provide the records, the Ministry has failed to establish that s. 13(1) applies to the information at issue; therefore, this information must be provided to the applicant. Under s. 4 of FIPPA, a person who makes an access

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[156] Order PO-3778, 2017 CanLII 78779 at paras. 54 and 58.
[157] FIN-2016-63848 (p. 96).
[158] Record located at FIN-2016-63904 (p. 55).
[159] Email chain found on page 58 of FIN-2016-63904.
[160] Letter from the Ministry dated February 1, 2019.
[161] I found the analysis and findings of Newfoundland and Labrador's Information and Privacy Commissioner in Report A-2019-019, 2019 CanLII 80273 to be useful and instructive in these circumstances.

request has the right of access to any record under the custody and control of the public body, subject to any exceptions that have been proven to apply. If the burden of proof is not met, as has occurred in this case, then the public body may not refuse the applicant access to the information.

Section 16 – harm to intergovernmental relations or received in confidence

[105] Section 16 of FIPPA authorizes public bodies to refuse access to information if disclosure would be harmful to intergovernmental relations. The parts of s. 16 relevant to this inquiry are as follows:

> 16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:
> …
>
> (iii) an aboriginal government;
> …
>
> (b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies…

[106] The Ministry is withholding information from two email chains under both s. 16(1)(a)(iii) and s. 16(1)(b).[162] Some of the same emails appear in both email chains and the same information was withheld from these emails. The Ministry submits that disclosure of the withheld information would reveal information that it received in confidence from an aboriginal government. It also says disclosing this same information would harm the BC government's relations with an aboriginal government.

Section 16(1)(b) – received in confidence

[107] I will first consider s. 16(1)(b) which protects information that could reasonably be expected to reveal information received in confidence from one of the bodies listed in s. 16(1)(a) or any of their agencies. The purpose of s. 16(1)(b) is "to promote and protect the free flow of information between governments and their agencies for the purpose of discharging their duties and functions."[163]

[108] The Ministry submits it received information in confidence from two aboriginal governments, one of which is the Tla'amin Nation.[164] The identity of

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[162] Records located at FIN-2016-63904 (pp. 18-20 and 55-57).
[163] Order No. 331-1999, 1999 CanLII 4253 (BC IPC) at p. 7.
[164] Formerly called the Sliammon First Nation. Affidavit of Director of Indigenous Tax, Tax Policy Branch (Director) at para. 6.

the other First Nation has been withheld from the records, but was provided *in camera*. I understand the Ministry to be arguing that disclosing the withheld information would reveal confidential information it received from these two First Nations.

[109] To determine whether s. 16(1)(b) applies in this case involves a multi-part test. First, did the Ministry receive information in confidence from an aboriginal government?[165] If so, could the disclosure of the withheld information reasonably be expected to reveal this confidential information?

Do the two First Nations qualify as "aboriginal governments"?

[110] The Ministry submits that the two First Nations qualify as aboriginal governments under FIPPA. Schedule 1 of FIPPA defines "aboriginal government" as meaning "an aboriginal organization exercising governmental functions." Previous OIPC orders have found that the term "aboriginal government" is not limited to bands or groups that have concluded self-government agreements or treaties.[166] In Order 01-13, former Commissioner Loukidelis held that "at the very least, an 'aboriginal government' includes a 'band' as defined in the Indian Act (Canada)."[167]

[111] I accept that the Tla'amin Nation qualifies as an "aboriginal government" under FIPPA. The Ministry provided an affidavit from the Ministry's current Director of Indigenous Tax, Tax Policy Branch (Director)[168] in which she explains how the Tla-amin Nation's inherent right to self-government is recognized and set out in the 2014 Tla'amin Final Agreement between the Tla'amin Nation, the Province of British Columbia and Canada.[169] I have also independently reviewed the Tla-amin Final Agreement which provides for a Tla'amin government and sets out authorities exercisable by that government. Therefore, I am satisfied the Tla'amin Nation is an aboriginal government under s. 16(1)(a) because it is an aboriginal organization exercising governmental functions.

[112] As for the other First Nation, the Director provided *in camera* information which describes how that First Nation qualifies as an aboriginal government. I am limited in what I can say about that information, but I accept this First Nation also qualifies as an aboriginal government under s. 16(1)(a) of FIPPA based on how past OIPC orders have interpreted that term.

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[165] Order 02-19, 2002 CanLII 42444 (BCIPC) at paras. 14-25.
[166] Order 01-13, 2001 CanLII 21567 at para. 14, citing Order No. 14-1994, [1994] BCIPCD No. 17.
[167] Order 01-13, 2001 CanLII 21567 at para. 14.
[168] At the time the disputed records were created, the Director was in the position of Strategic Advisor for Indigenous Tax, Tax Policy Branch.
[169] Affidavit of Director at para. 7.

Was information received from the aboriginal governments?

[113] The Ministry must establish that it received information from the two aboriginal governments. In her affidavit, the Director describes some of the emails and explains that the email chain starts with an email from the Chief Administrative Officer (CAO) of the Tla'amin Nation to an individual who represents the Tla'amin Nation. When this individual replied to the CAO, he also copied the Director to bring her into the conversation and ask her questions about the MRDT.[170] Other emails follow including an email from the Director to the Policy Analyst requesting "advice on how to respond."[171]

[114] Based on the Director's affidavit and my own review of the relevant emails, I can see that representatives of the Tla'amin Nation contacted the Director about a matter related to the MRDT. In her affidavit, the Director provides an *in camera* description of this matter.[172] But, it is clear from information disclosed in the emails that the Tla'amin Nation had questions about the MRDT, including its implementation and scope. I understand the Ministry is protecting what the Tla'amin Nation specifically asked about the MRDT and the nature of the matter. I find this information came from the Tla-amin Nation, thus it was received by the Ministry from an aboriginal government.

[115] I also find that an email from the Policy Analyst to the Director contains information that the Ministry previously received from the other First Nation.[173] The Director also provides *in camera* information which describes this information.[174] I find this information similar to the information provided by the Tla-amin Nation. I am unable to say more, but considering the circumstances, I accept that this information could have only come from this other First Nation and not another source.

Was this information received in confidence?

[116] The next question in the s. 16(1)(b) analysis is to consider whether the information received from the aboriginal governments was done so in confidence. Section 16(1)(b) requires public bodies to look at the intentions of *both* parties, in all the circumstances, in order to determine if the information was "received in confidence."[175] Past OIPC orders have said there must be an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information.[176]

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[170] Affidavit of Director at para. 9.
[171] Email located at FIN-2016-63904 at p. 55.
[172] Affidavit of Director at para. 13.
[173] Record located at FIN-2016-63904 at p. 55.
[174] Affidavit of Director at para. 13.
[175] Order No. 331-1999, 1999 CanLII 4253 (BC IPC) at p. 8 [emphasis added].
[176] *Ibid* at p. 7.

[117] In Order No. 331-1999, former Commissioner Loukidelis identified several non-exhaustive factors that may be considered to determine if the information was "received in confidence," including the nature of the information, explicit statements of confidentiality, evidence of an agreement or understanding of confidentiality and objective evidence of an expectation of or concern for confidentiality.[177]

Ministry's submission on confidentiality

[118] The Director says she was brought into the email chain with the Tla'amin Nation because she was a "point of contact for treaty matters relating to taxation."[178] She explains that the matter raised by the Tla'amin Nation was done so in confidence "as part of the government-to-government relationship between the Province and a Treaty First Nation."[179] She claims that it is a fundamental part of this relationship that all parties can trust the confidentiality of these discussions.[180] The Director characterizes the information as part of "Treaty negotiations" and claims "the parties negotiate in good faith, based on process agreements that include commitments respecting communications and confidentiality."[181]

[119] In her affidavit, the Director also reveals there is a "Privilege and Confidentiality Notice" in the initial email from the CAO of the Tla'amin Nation that she says "states, among other things, that the information is confidential."[182] The Director says this confidentiality notice is "consistent with the understanding of the Ministry and what it believes the expectation of the Tla'amin Nation and all other First Nations would be with this process."[183]

Analysis and findings on confidentiality

[120] It is clear from the Ministry's submission and evidence that the Ministry believes the information it received from both of the First Nations is confidential. However, "in almost all cases – the necessary element of confidentiality will not be established solely because the receiver of the information intends it to be confidential."[184] There must be evidence of an expectation of confidentiality on the part of both the supplier and the receiver of the information.[185]

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[177] Order No. 331-1999, 1999 CanLII 4253 (BC IPC) at pp. 8-9.
[178] Affidavit of Director at para. 10.
[179] Affidavit of Director at para. 10.
[180] *Ibid* at para. 11.
[181] *Ibid* at paras. 11-12.
[182] *Ibid* at para. 14.
[183] *Ibid*. The Ministry withheld this confidentiality notice from the records given to the applicant.
[184] Order No. 331-1999, 1999 CanLII 4253 (BC IPC) at p. 7.
[185] *Ibid*, cited with approval in *Chesal v. Attorney General of Nova Scotia*, 2003 NSCA 124 at paras. 71-72.

[121] The Ministry did not provide any evidence supporting its position on s. 16(1)(b) from any of the two aboriginal governments. The question then is whether the record or the circumstances contain evidence that the Ministry's belief was objectively warranted.[186] There must be some contextual or objective evidence which indicates the information was received in confidence.[187]

[122] Considering the records and the evidence before me, I am not satisfied the information was received in confidence by the Ministry. I have reviewed the confidentiality notice and do not find it to be persuasive evidence of an expectation of confidentiality on the part of the Tla'amin Nation. Previous OIPC orders have found that generic confidentiality disclaimers at the end of email communications are not by themselves sufficient to demonstrate an intention of confidentiality.[188]

[123] In this case, the confidentiality notice is a standard confidentiality notice that is attached to the CAO's email as part of his signature block. It contains boilerplate language which does not convince me that this notice was specific to the information in the email from the CAO of the Tla'amin Nation. In particular, there is nothing in the body of the email or the subsequent emails discussing this matter which indicates either of the First Nations considered this matter confidential.

[124] I am also unable to conclude that a reasonable person would regard the information withheld from the emails as confidential in nature. The initial email from the Tla-amin Nation CAO, which the Director was later copied on, is a request for information about the MRDT to an individual who represents the Tla'amin Nation. One of the email chains concludes with the Director providing the representatives of the Tla'amin Nation with the answers to those questions.[189] The Ministry disclosed the Director's answers to the applicant which allows someone to accurately infer that the CAO's questions were about how the MRDT applies to Tla-amin lands. There is no persuasive evidence that any of this withheld information is inherently sensitive or confidential.

[125] The Director describes the withheld information as part of "Treaty negotiations," but it is unclear how the particular information at issue qualifies as such. Black's Law Dictionary defines "negotiations", in part, as "a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter."[190] In this case, the Tla'amin Nation asked a question about the MRDT and the Director later provided an answer. There is no explanation or persuasive evidence of a dispute or even a potential

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[186] *Chesal v. Attorney General of Nova Scotia*, 2003 NSCA 124 at para. 67.
[187] Order F17-28, 2017 BCIPC 30 at para. 35.
[188] Order F13-01, 2013 BCIPC 1 at para. 26.
[189] Record located at FIN-2016-63904 at p. 18.
[190] Black's Law Dictionary, 10th ed, *sub verbo* "negotiations."

dispute. There is also no evidence of a bargaining process or further discussions between the parties on any of the issues. To conclude, I am not persuaded that this information was a part of any confidential treaty negotiations.

Conclusion on s. 16(1)(b)

[126] To summarize, I find the Ministry received information from two aboriginal governments. However, I am not satisfied based on the materials before me that the Ministry received this information in confidence. I, therefore, conclude the Ministry may not withhold the information at issue under s. 16(1)(b).

Section 16(1)(a) – harm relations between governments

[127] The Ministry also claims s. 16(1)(a)(iii) applies to the same information it withheld under s. 16(1)(b). Section 16(1)(a)(iii) protects information that if disclosed could reasonably be expected to harm relations between the BC government and an aboriginal government.

[128] The standard of proof applicable to harms-based exceptions like s. 16(1) is whether disclosure of the information could reasonably be expected to cause the specific harm.[191] The Supreme Court of Canada has described this standard as "a reasonable expectation of probable harm" and "a middle ground between that which is probable and that which is merely possible."[192] The party who has the burden of proof need not show on a balance of probabilities that the harm will occur if the information is disclosed, but it must demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative.[193]

[129] The Ministry's submissions on harm are tied to its claims of confidentiality under s. 16(1)(b). The Ministry submits that the alleged "harm suffered under s. 16(1)(a)(iii) would result from disclosure of information understood to be confidential and protected from disclosure by s. 16(1)(b)."[194]

[130] The Director says "a breakdown in confidentiality, would lead directly to a breakdown in trust with not only the Tla'amin Nation, but all First Nations involved in Treaty negotiations."[195] She claims that "such a breach of confidentiality would severely damage the Province's, and potentially Canada's, relationship with First

[191] Order F17-28, 2017 BCIPC 30 at para. 49.
[192] *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54. See also Order F17-28, 2017 BCIPC 30 at para. 49 where this standard is applied to s. 16(1)(a).
[193] *Merck Frosst Canada Ltd. v Canada (Health),* 2012 SCC 3 at para. 196.
[194] Ministry's submission dated June 21, 2018 at para. 120.
[195] Affidavit of Director at para. 12.

Nations in the sense that the trust that is critical to this process would be damaged."[196]

[131] Relying on my findings under s. 16(1)(b), I am not persuaded that this information relates to confidential treaty negotiations or was provided by the two First Nations in confidence. Further, even if I had been able to conclude the information was confidential, I am not satisfied disclosure of the information could reasonably be expected to result in the alleged harm.

[132] In Order 01-13, former Commissioner Loukidelis clarified that "s. 16(1)(a) is not triggered simply because confidentiality is agreed upon in relation to a matter and the disclosing government or organization might be upset by disclosure."[197] Instead, the public body must provide evidence to establish "a direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure."[198]

[133] In this case, the Ministry has not established how the disclosure of the withheld information could reasonably be expected to damage the Province's relationship with treaty First Nations or even these two particular aboriginal governments. In my view, the Ministry's submission and evidence on harm is speculative and lacks evidentiary support. For example, the Ministry did not provide any evidence supporting its position on s. 16(1)(a)(iii) from any of the two aboriginal governments.

[134] I also note that most of the information the Ministry now seeks to protect can be easily inferred from the Director's already disclosed answers to the Tla'amin Nation's questions or was disclosed elsewhere in the records. The Ministry does not discuss whether any harm occurred from this initial disclosure and it does not explain how a subsequent disclosure of this information now could reasonably be expected to result in the alleged harm.

[135] Ultimately, I find the Ministry has not established that disclosure of the withheld information could reasonably be expected to result in the harm the Ministry alleges could occur. I, therefore, conclude the Ministry may not withhold the information at issue under s. 16(1)(a)(iii).

Section 22 –harm to third party personal privacy

[136] Section 22 of FIPPA provides that a public body must refuse to disclose personal information the disclosure of which would unreasonably invade a third

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[196] Affidavit of Director at para. 12.
[197] Order 01-13, 2001 CanLII 21567 (BC IPC) at para. 30.
[198] *Merck Frosst Canada Ltd. v Canada (Health),* 2012 SCC 3 at para. 219; Order F17-28, 2017 BCIPC 30 at para. 50 and Order F18-14, 2018 BCIPC 17 at para. 34.

party's personal privacy. Previous OIPC orders have considered the application of s. 22 and I will apply the same approach in this inquiry.[199]

[137] As previously noted, the applicant is only interested in some of the s. 22 information withheld by the Ministry from the records. The remaining information in dispute under s. 22 is located in several email chains, including a briefing note.[200] The Ministry withheld some of the same information in a few of the email chains.[201]

Personal information

[138] 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."[202] Information is about an identifiable individual when it is reasonably capable of identifying a particular individual, either alone or when combined with other available sources of information.[203] 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."[204]

Email

[139] The Ministry withheld one entire paragraph in an email.[205] I find the information in this paragraph qualifies as "personal information" under FIPPA. Some of the information directly identifies two third parties by name, specifically the email recipient's name and the name of another third party, and discusses a third party's actions.

[140] There is also information which I find is both the personal information of the applicant and of the President of the Society (i.e. the person who wrote the email).[206] The withheld information includes the President's views and opinions about the applicant and his actions. Previous OIPC orders have found this type of information is simultaneously the applicant's personal information because it is

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[199] See Order F17-39, 2017 BCIPC 43 at paras. 71-138; Order F16-36, 2016 BCIPC 40; Order F14-41, 2014 BCIPC 44 at para. 10.
[200] Records located at FIN-2016-63904 at pp. 61, 64, 67, 78 (briefing note) and FIN-2016-63848 at p. 113 (briefing note).
[201] The same information withheld at FIN-2016-63904 (p. 61) was withheld under FIN-2016-63904 (pp. 64 and 67) and the information withheld under FIN-2016-63904 (p. 78) was also withheld under FIN-2016-63904 (p. 113).
[202] See Schedule 1 of FIPPA for this definition.
[203] Order F16-36, 2016 BCIPC 40 at para. 17.
[204] See Schedule 1 of FIPPA for this definition.
[205] This email is found on pp. 61, 64 and 67 of FIN-2016-63904.
[206] The Ministry disclosed the identity of the email writer as the President of the Society.

about the applicant and also the personal information of the third party that made the statements because it is their opinion.[207]

[141] The remaining personal information is in the form of the President's thoughts, feelings and observations about aspects of a matter. This information is located at the beginning and end of the withheld paragraph. I find this information to be the President's personal information.

Briefing Note

[142] The Ministry withheld one paragraph in a briefing note attached to an email.[208] Although the withheld information discusses an individual third party, that person is not named anywhere in the briefing note. Instead, this person is generally referred to as a staff member of a particular organization. Their individual identity is not apparent from my review of the withheld information, the records or the surrounding circumstances.

[143] Previous OIPC orders have said that a public body has the initial burden of proving that the information in the records at issue is personal information under s. 22:

> …It is up to a public body to establish whether information in requested records is personal information and whether excepted information can reasonably be severed under s. 4(2) of the Act, as part of its burden to prove that an applicant has no right of access to requested records…The applicant's burden, under s. 57(2), is the burden of proving that disclosure of information the [public body] establishes is personal information would not be an unreasonable invasion of third-party personal privacy under s. 22.[209]

[144] In this case, the Ministry does not provide any direct submissions to explain how this person can be identified. The definition of "personal information" requires an "identifiable" individual. I find that the information at issue is not reasonably capable of identifying a particular individual on its own or when combined with other available sources of information.[210] As a result, I conclude this information is not personal information so it cannot be withheld under s. 22.

Section 22 information also withheld under s. 14

[145] Along with s. 14, the Ministry also applied s. 22(1) to information withheld in three emails chains.[211] The Ministry's description of these records in the

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[207] Order F17-01, 2017 BCIPC 1 at para. 48 and Order F14-47, 2014 BCIPC 51 at para. 14.
[208] Document found at FIN-2016-63904 (p. 78) and FIN-2016-63848 (p. 113).
[209] Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 10–11.
[210] Order F08-16, 2008 CanLII 57359 (BC IPC) at paras. 48 and 49.
[211] Email chains found on pages 58, 72, and 239 of FIN-2016-63904.

records table provides no useful information about whether the information in the three email chains is personal information. In the table, the Ministry only lists s. 22 as an exception it applied to the records.

[146] The Policy Analyst says the Ministry applied s. 22 to the employment history of a third party.[212] However, without reviewing the records, I am unable to determine from the Policy Analyst's assertions alone whether the information at issue is personal information for the purposes of FIPPA. During the inquiry, I asked the Ministry to provide the withheld information for my review; however, it declined to do so on the basis s. 14 also applies.[213] Based on the insufficiency of the Ministry's evidence, I conclude the Ministry has not proven that the information at issue in these email chains qualifies as personal information under s. 22.

Section 22(4) – disclosure not unreasonable

[147] The second step in the s. 22 analysis is to determine if the personal information falls into any of the types of information or circumstances listed in s. 22(4). If it does, then the disclosure of the personal information is deemed not to be an unreasonable invasion of a third party's personal privacy and the information should be disclosed.

[148] The Ministry submits that none of the provisions under s. 22(4) applies. I have considered the types of information and factors listed under s. 22(4) and find that none apply to the personal information withheld from the email.

Section 22(3) – presumptions in favour of withholding

[149] The third step in the s. 22 analysis is to determine whether any of the presumptions in s. 22(3) apply. "Section 22(3) creates a rebuttable presumption that the disclosure of personal information of certain kinds or in certain circumstances would be an unreasonable invasion of third party personal privacy."[214]

[150] Under s. 22(3)(d), a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information relates to employment, occupational or educational history. The Ministry says s. 22(3)(d) applies to the personal information in the email since it is the "employment history of a third party."[215] The Ministry provides an *in camera*

[212] Affidavit of Policy Analyst at para. 20, including *in camera* information.
[213] Letter from the Ministry dated February 1, 2019.
[214] *B.C. Teachers' Federation, Nanaimo District Teachers' Association et al. v Information and Privacy Commissioner (B.C.) et al*., 2006 BCSC 131 (CanLII) at para. 45.
[215] Ministry's submission dated June 21, 2018 at para. 144.

explanation as to why it thinks this information relates to a third party's employment history.[216]

[151] I do not find the Ministry's *in camera* submissions to be persuasive. Without revealing any of that information, I can say that the Ministry's arguments do not adequately explain how the personal information withheld from the President's email relates to a third party's employment history. Instead, the Ministry's submission focuses more on the information it has already disclosed, rather than the actual information at issue.

[152] I have also considered that the term "employment history" under s. 22(3)(d) includes descriptive information about an employee's workplace behavior or actions in the context of a workplace complaint investigation or disciplinary matter.[217] There is no indication that the personal information withheld in the email was part of an investigation into a workplace complaint or a disciplinary matter involving a third party. The Ministry disclosed information in the records that indicates the email is from the Society's president and that she is forwarding an email written by the applicant to the Policy Analyst. In his email, the applicant accuses the Policy Analyst of some alleged wrongdoing; however, there is no evidence of a workplace investigation into the Policy Analyst's actions because of the applicant's accusations.

[153] Ultimately, I am not satisfied that any of the personal information withheld from the president's email, including her thoughts and comments, can be characterized as relating to a third party's employment history for the purposes of s. 22(3)(d). The information at issue mostly reveals what the Society's president had to say about the applicant, about his email or his actions.

[154] I have also considered whether any other section 22(3) presumptions may apply and find none that would apply to the personal information at issue.

Section 22(2) – relevant circumstances

[155] The final step in the s. 22 analysis is to consider the impact of disclosing the personal information at issue in light of all relevant circumstances, including those listed under s. 22(2).

Scrutiny of the public body – s. 22(2)(a)

[156] One of the factors listed under s. 22(2) is s. 22(2)(a) which considers whether disclosing the third party's personal information is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny.

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[216] *Ibid* and affidavit of Policy Analyst at para. 20.
[217] Order 01-53, 2001 CanLII 21607 at para. 32.

[157] The Ministry cites s. 22(2)(a) as a factor in favour of non-disclosure. It says disclosing the withheld information would not subject it to public scrutiny.[218] The applicant does not make any specific submissions regarding s. 22(2). However, he generally takes the position that all the information withheld by the Ministry should be disclosed because the Ministry and the other people involved cannot be trusted.[219]

[158] As noted, the withheld information would reveal two third parties' by name and what the Society's president said about the applicant. I do not see how disclosing this third party personal information would enable public scrutiny of the Ministry's activities. Section 22(2)(a) relates to the scrutiny of a public body's activities rather than subjecting a third party's activities to public scrutiny.[220] The information at issue would only reveal a third party's activities; therefore, s. 22(2)(a) is not a factor favouring disclosure.

Information already disclosed

[159] I note that, based on information already disclosed in the records, one can easily infer the two third parties' names, any references to them and some additional information at issue. The disclosed information reveals the name of the email recipient and the fact that the applicant's email was forwarded to her.[221] The email itself shows the name of the other third party and that this person sent the applicant's email to the Society's president. It is unclear how disclosing all of this information a second time would unreasonably invade their personal privacy, especially considering most of this information is factual in nature. There is also no evidence that these third parties were concerned by the Ministry's original disclosure of this information. Therefore, this factor weighs in favour of disclosure.

Applicant's existing knowledge

[160] Previous OIPC orders have found the fact that an applicant is aware of, can easily infer, or already knows the third party personal information in dispute is a relevant circumstance in favour of disclosure.[222] It is apparent from the applicant's submission and the records that the applicant is already aware of what the Society's president thinks of him, his emails and his allegations. The president's views and opinion on these matters are disclosed elsewhere in the records and referred to in the applicant's submissions. Therefore, this factor weighs in favour of disclosure.

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[218] Ministry's submission dated June 21, 2018 at paras. 146-148.
[219] Applicant's initial submission at para. 19.
[220] Order F16-14, 2016 BCIPC 16 at para. 40 and Order F12-12, 2012 BCIPC 17 at para. 38.
[221] This information is found in the email and a related email found at p. 67 of FIN-2016-63904.
[222] Order F18-19, 2018 BCIPC 22 at para. 74.

Sensitivity of the information

[161] Previous OIPC orders have considered the sensitivity of the personal information at issue and where the sensitivity of the information is high (i.e. medical or other intimate information), withholding the information should be favoured.[223] However, where the information is of a non-sensitive nature or that sensitivity is reduced by the circumstances, then this factor may weigh in favour of disclosure.[224]

[162] I have considered the sensitivity of the information as it applies to the president's thoughts, feelings and observations. I do not find this information to be particularly sensitive, intimate or personally revealing. This information consists of general remarks and comments and some factual observations. Therefore, this factor weighs in favour of disclosure.

Conclusion on s. 22(1)

[163] To summarize, I have found that only some of the withheld information qualifies as "personal information" under s. 22, specifically the information withheld from the Society president's email. I conclude s. 22(4) does not apply to this personal information. I have also found there are no s. 22(3) presumptions that apply, specifically this information does not qualify as the employment history of a third party.

[164] Considering all the relevant circumstances under s. 22(2), I find that it would not be an unreasonable invasion of third party personal privacy to disclose the disputed information. This information has already been disclosed or is known to the applicant and it is not particularly sensitive. I, therefore, conclude the Ministry is not required to withhold the personal information it has severed from the email in dispute under s. 22(1) of FIPPA.

CONCLUSION

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

1. The Ministry is not authorized or required to refuse to disclose the information withheld under ss. 16(1) and 22(1) of FIPPA.

2. Subject to paragraph 3 below, I confirm in part the Ministry's decision to refuse access to information withheld under ss. 12(1) and 13(1) and 14 of FIPPA.

[223] Order F16-52, 2016 BCIPC 58 at para. 87.
[224] Order F16-52, 2016 BCIPC 58 at paras. 87-91 and 93.

3. The Ministry is not authorized or required to refuse to disclose the information on the following pages under ss. 12(1), 13(1) and 14:

    - FIN-2016-63904 at pages 55; 58-60; 72-74; 75 to top of p. 76; 81 (handwritten notes); 82 (the one page email between the Policy Analyst and the correspondence coordinator); 219-220; 239-241and 243-246 (the draft correspondence attached to the email);

    - FIN-2016-62160 at pages 14-16, this same information was also withheld on pages 164-166 of FIN-2016-63848.

    - FIN-2016-63848 at pages 96; 141-142; 167 and 170-171.

4. The Ministry must disclose to the applicant the information it is not authorized or required to withhold and it must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, along with a copy of the relevant records.

[166] Under s. 59 of FIPPA, the Ministry is required to give the applicant access to the information it is not authorized or required to withhold by December 11, 2019.

October 29, 2019

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

OIPC File No.: F16-67664, F17-70478, F17-70479