Order F21-45

MINISTRY OF TRANSPORTATION AND INFRASTRUCTURE

Lisa Siew
Adjudicator

October 1, 2021

CanLII Cite: 2021 BCIPC 53
Quicklaw Cite: [2021] B.C.I.P.C.D. No. 53

Summary: An applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records related to the BC Pavilion Corporation (PavCo), the Evergreen Line and the George Massey Tunnel replacement project. The Ministry of Transportation and Infrastructure (Ministry) provided partial access to the records by withholding information under ss. 12(1) (cabinet confidences), 13(1) (advice or recommendations), 14 (solicitor-client privilege), 16(1)(a) (harm to intergovernmental relations or negotiations), 17(1) (harm to financial or economic interests of a public body), 21(1) (disclosure harmful to third-party business interests) and 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA. The adjudicator determined the Ministry was authorized or required to withhold some of the information at issue under ss. 12(1), 14 and 22(1), but was not authorized or required to withhold the remaining information in dispute.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 13(1), 14, 16(1)(a)(iii), 17(1), 21(1), 22(1), 22(2), 22(3), 22(4).

INTRODUCTION

[1] An applicant made an access request to the Ministry of Transportation and Infrastructure (Ministry), under the *Freedom of Information and Protection of Privacy Act* (FIPPA), for certain records related to the BC Pavilion Corporation (PavCo), the Evergreen Line and the George Massey Tunnel replacement project.

[2] After consultation with PavCo,[1] the Ministry provided the applicant with partial access to the records, but withheld information under ss. 12(1) (cabinet confidences), 13(1) (advice or recommendations), 14 (solicitor-client privilege), 16(1)(a) (harm to intergovernmental relations), 17(1) (harm to financial or

[1] Discussed in a letter dated December 1, 2020 from PavCo's legal counsel to the OIPC's registrar of inquiries and the other parties regarding submission deadlines.

economic interests of a public body), 21(1) (disclosure harmful to third-party business interests) and 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA.

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. Mediation did not resolve the matters at issue and they were forwarded to an inquiry. The applicant and the Ministry provided submissions for the inquiry. The Ministry's evidence includes pre-approved *in camera* material.[2]

[4] During the inquiry, the OIPC issued third party notices to PavCo and the Vancouver Whitecaps FC (Whitecaps).[3] PavCo and the Whitecaps were invited to provide submissions for this inquiry, but they both declined to do so.

ISSUES

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

1. Is the Ministry required to refuse to disclose the information at issue under ss. 12(1), 21(1) and 22(1)?

2. Is the Ministry authorized to refuse to disclose the information at issue under ss. 13(1), 14, 16(1)(a), and 17(1)?

[6] The Ministry submits, and I agree, that s. 57(1) of FIPPA places the burden on the Ministry to prove the applicant has no right of access to the information withheld under ss. 12(1), 13(1), 14, 16(1)(a), 17(1) and 21(1).[4]

[7] Where a public body refuses access under s. 22(1), s. 57(2) places the burden on the applicant to establish that disclosure of the information at issue would not unreasonably invade a third party's personal privacy. However, the public body has the initial burden of proving the information at issue qualifies as personal information under s. 22(1).[5]

RECORDS AND INFORMATION AT ISSUE

[8] The responsive records total 220 pages with approximately 42 of those pages containing the information at issue. I note that some of the withheld information is no longer at issue. During the inquiry, the Ministry reconsidered its

---

[2] The Ministry did not provide all its approved *in camera* material on an *in camera* basis, but decided to openly disclose some of this information in its inquiry submission, specifically paragraph 7 of the Assistant Deputy Minister's affidavit.
[3] Under s. 54 of FIPPA, the OIPC has the power to provide a copy of the applicant's request for review to any person the Commissioner considers appropriate.
[4] Ministry's submission dated January 11, 2021 at para. 9.
[5] Order 03-41, 2003 CanLII 49220 (BCIPC) at paras. 9–11.

application of s. 16(1) to the information withheld on page 32 of the records. The Ministry has since disclosed this information to the applicant and it is, therefore, no longer in dispute in this inquiry.

[9] In some cases, the Ministry applied several FIPPA exceptions to the same information. For instance, the Ministry withheld one record under ss. 13(1), 17(1) and also under s. 21(1).[6] In those cases, if I find one FIPPA exception applies, then it is not necessary for me to consider whether the other FIPPA exceptions also apply to this information.

DISCUSSION

Background

[10] The applicant requested the Ministry provide access to the following records:

> Minister Todd Stone's budget estimates briefing book chapters or volumes on B.C. Pavilion Corporation, Evergreen Line and Massey Tunnel Replacement. (Date Range for Record Search: From 04/25/2016 To 04/29/2016)

[11] The Ministry plans and improves transportation networks, builds new infrastructure, provides transportation services, and implements transportation policies, to allow for the safe and efficient movement of people and goods.[7] In 2016, the Honourable Todd Stone was the Minister of Transportation and Infrastructure.

[12] The Evergreen Line was a project undertaken by the provincial government that extended rapid transit into the Coquitlam, Port Moody and Port Coquitlam areas. Construction on the project began in March 2013 and was completed in late 2016.[8]

[13] The George Massey Tunnel is a highway traffic tunnel located in the Metro Vancouver area that connects the cities of Richmond and Delta. The Ministry has consulted with stakeholders and the public, since 2012, on various options for the replacement of the George Massey Tunnel.[9]

---

[6] Document located on pages 26-28 of the records.
[7] Available online at: https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/ministries/transportation-and-infrastructure?keyword=ministry&keyword=of&keyword=transportation&keyword=and&keyword=infrastructure.
[8] Information located on p. 3 of the records.
[9] Information located on p. 5 of the records.

[14] PavCo is a public body under Schedule 2 of FIPPA and was subject to the oversight of the Ministry between 2013 and July 2017.[10] PavCo is a provincial crown corporation that owns and operates BC Place Stadium located in downtown Vancouver.[11] BC Place Stadium is a multipurpose venue that hosts sport, exhibitions, entertainment and special events and it is the home stadium of the Whitecaps.[12]

[15] The Whitecaps are a privately-owned professional soccer club that operates a team in Major League Soccer, the top professional soccer league in the United States and Canada. The Whitecaps play their home games at BC Place Stadium and have a licence agreement with PavCo that governs its use of BC Place Stadium.[13]

Section 12(1) – cabinet confidences

[16] Section 12(1) 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, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

[17] 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).[14] Past OIPC orders and court decisions have recognized the public interest in maintaining Cabinet confidentiality to ensure and encourage full discussion by Cabinet members.[15]

[18] Determining whether information is properly withheld under s. 12(1) involves a two-part analysis. The first question is whether disclosure of the withheld information would reveal the "substance of deliberations" of Cabinet or any of its committees. The BC Court of Appeal has determined 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.[16]

---

[10] Affidavit of KR at para. 3.
[11] Affidavit of KR at para. 7.
[12] Information located on p. 160 of the records.
[13] None of the parties provided background information about the Whitecaps. This information comes from Order F19-03, 2019 BCIPC 4 (CanLII) at para. 15.
[14] *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 at para. 92.
[15] 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).
[16] *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner),* 1998 CanLII 6444 (BC CA) [*Aquasource*] at para. 39.

[19] According to the Court of Appeal, 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.[17] In other words, the term "substance of deliberations" includes any recorded information Cabinet or one of its committees considered in deliberations. I am bound by this interpretation of s. 12(1).

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

The records or information withheld under s. 12(1)

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

- A 26-page document described by the Ministry as "Treasury Board Submission."[18]
- A 5-page document described by the Ministry as "Cabinet Submission."[19]
- An 8-page letter dated November 19, 2015 from the Assistant Deputy Minister of Finance and Management Services to PavCo's Chief Financial Officer.[20]

[22] In support of its position that s. 12(1) applies to the Treasury Board Submission, the Ministry provided an affidavit from the acting Assistant Deputy Minister of Treasury Board Staff, who is also the Deputy Secretary of Treasury Board.

[23] With regards to the Cabinet Submission, the Ministry provided an affidavit from a records management officer in Cabinet Operations, Office of the Premier to establish there were committee and Cabinet meetings where this information was considered.

[24] I will consider and discuss the contents of these affidavits in my analysis below.

[25] The applicant considers none of the information at issue to be confidential cabinet information. The applicant explains that the records he is seeking "were

[17] *Aquasource* at para. 48.
[18] Pages 42-67 of the records were completely withheld under s. 12(1).
[19] Pages 74-78 of the records were completely withheld under s. 12(1).
[20] Only part of this letter was withheld under s. 12(1) and this information is located on p. 141 of the records.

created for and held by the Minister [Stone] and his staff for the purpose of answering questions from the Opposition critics for the portfolio at budget estimates hearings."[21] The applicant notes that the "information contained in the estimates briefing book was used in the open committee meeting", which was held on live TV/webcast with members of the media present.[22] The applicant says the records "were for quick reference to answer in the public domain to the Opposition critics across the vast portfolio of the Ministry, during the budget process in 2016."[23]

Section 12(1) – substance of deliberations

[26] The first question in the s. 12 analysis is to consider whether disclosure of the withheld information would reveal the "substance of deliberations" of Cabinet or any of its committees. I will discuss, in turn, each of the records at issue starting with the Treasury Board Submission and then moving on to consider the information withheld in the letter and then the Cabinet Submission.

Treasury Board Submission

[27] Section 12 only applies to the Executive Council (Cabinet) or one of its committees; therefore, the question I must address at this point is whether the Treasury Board is a Cabinet committee. Section 12(5) of FIPPA allows the Lieutenant Governor in Council to designate a committee for the purposes of s. 12.[24] The *Committees of the Executive Council Regulation* lists the Treasury Board as a designated committee.[25] As a result, I find the Treasury Board was a Cabinet committee for the purposes of s. 12.

[28] The next question is whether disclosing the Treasury Board Submission would reveal the substance of the Treasury Board's deliberations. The acting Assistant Deputy Minister explains that the Treasury Board is a "standing committee of Cabinet responsible for making financial decisions and managing the government's fiscal plan which includes revenue, spending, capital infrastructure and debt considerations."[26]

[29] In support of the Ministry's application of s. 12(1), the acting Assistant Deputy Minister attests that some of the information at issue was considered by the Treasury Board at a meeting on March 8, 2016.[27] For other information, the

[21] Applicant's submission at para. 4.
[22] Applicant's submission at paras. 4 and 10.
[23] Applicant's submission at para. 6.
[24] Order 04-34, [2004] BCIPCD No. 35 at para. 14: "Section 12 of the Act was amended in November 2002 to allow for the designation by regulation of committees of the Executive Council for the purposes of s. 12."
[25] B.C. Reg. 229/2005.
[26] Affidavit of acting Assistant Deputy Minister at para. 4.
[27] Affidavit of acting Assistant Deputy Minister at para. 6.

acting Assistant Deputy Minister says, although the Treasury Board may not have directly reviewed these documents, it relates to the information that was considered by Treasury Board and "would disclose the substance of Treasury's Board's deliberations on the relevant matters."[28]

[30] I am satisfied some of the information withheld in the Treasury Board Submission would reveal what the Treasury Board considered at its March 8, 2016 meeting. I can tell from reviewing the disputed record that the Treasury Board considered some of the withheld information and made a decision about this information.[29]

[31] The acting Assistant Deputy Minister also explains how the remaining information at issue in this document, which was not considered by the Treasury Board, still reflects the Treasury Board's deliberations on the relevant matters.[30] Previous OIPC orders have concluded that s. 12(1) applied to information that would reveal the same or similar information considered by Cabinet or one of its committees.[31] Therefore, even though the Treasury Board did not directly consider this information, I accept that its disclosure would reveal information substantially similar to the body of information that the Treasury Board did consider.

[32] As a result, for the reasons given, I conclude the Treasury Board Submission would reveal the substance of a Cabinet committee's deliberations or allow an accurate inference about that information.

Letter dated November 19, 2015

[33] The letter is from the Assistant Deputy Minister of Finance and Management Services to PavCo's Chief Financial Officer.[32] It deals with "Budget 2015" with the Assistant Deputy Minister informing PavCo of the "direction set by Treasury Board to ensure that [PavCo] takes appropriate action to help government achieve or improve on its financial targets."[33] The Ministry withheld some information on page 3 of this letter under the section titled, "Fiscal Targets and Capital Management".

[34] I can see that some of the information withheld in the letter is the same or similar to the information in the Treasury Board Submission, which I found would reveal the substance of the Treasury Board's deliberations.[34] As a result, although this information in the letter was not directly submitted to the Treasury

[28] Affidavit of acting Assistant Deputy Minister at para. 7.
[29] Page 43 of the records.
[30] Affidavit of acting Assistant Deputy Minister at paras. 6-9.
[31] Order F09-26, 2009 CanLII 66959 (BC IPC) at paras. 21-23.
[32] Information located on p. 141 of the records.
[33] Page 140 of the records.
[34] Similar information withheld on pp. 43, 48, 60 of the records.

Board, I accept that its disclosure would allow someone to accurately infer information which formed part of the body of information considered by the Treasury Board and, thereby, reveal the substance of its deliberations.

[35] However, I find the rest of the information withheld in the letter only reveals instructions or directions to PavCo rather than the substance of deliberations. It is not apparent that this information was incorporated into documents submitted or prepared for submission to Cabinet or one of its committees. I note that neither of the affiants discuss this withheld information in their affidavits. The Ministry also did not discuss this specific letter in its submission to establish that disclosing the information at issue would reveal information properly withheld under s. 12(1). Therefore, for all the reasons given, I conclude the Ministry has not proven that s. 12(1) applies to this information.[35]

Cabinet Submission

[36] The Ministry submits the Cabinet Submission was considered at a February 15, 2016 Cabinet committee meeting. The records management officer says, based on her review of "internal historical records", she believes a Cabinet committee meeting took place on February 15, 2016 and that a Cabinet meeting took place on February 24, 2016.[36] The records management officer explains that the role of Cabinet Operations includes preparing minutes based on the outcome of Cabinet meetings and providing "records of decisions to the appropriate ministry or ministries."[37] The Ministry's evidence also includes a "Record of Decision, dated March 4, 2016" from the Cabinet meeting that took place on February 24, 2016.[38] The records management officer says, and I agree, that the "Record of Decision" references the Cabinet Submission.[39]

[37] Based on my review of the "Record of Decision", I am satisfied the Cabinet Submission was considered by a Cabinet committee on February 15, 2016. Without revealing any *in camera* information, I can see that this committee is listed as a designated committee under the *Committees of the Executive Council Regulation* for that time period.[40] The Ministry's evidence also establishes that the Cabinet Submission was considered by this committee. Therefore, based on the materials before me, I conclude that disclosing the Cabinet Submission would reveal the substance of deliberations of a Cabinet committee.

---

[35] The Ministry also withheld this same information under both ss. 13 and 17. I will consider later under those sections whether those exceptions apply to this information.
[36] Affidavit of records management officer at para. 7.
[37] Affidavit of records management officer at para. 6.
[38] The records management officer openly provides this evidence about the Record of Decision, although it was accepted into the inquiry on an *in camera* basis.
[39] Affidavit of records management officer at para. 7.
[40] B.C. Reg. 229/2005.

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

[38] The second step in the s. 12 analysis is to decide if any of the circumstances under ss. 12(2)(a) to (c) apply to the information that I have found would reveal the substance of deliberations. Section 12(2) says:

> 12(2) Subsection (1) does not apply to
>
> > (a) information in a record that has been in existence for 15 or more years,
> >
> > (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or
> >
> > (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.

[39] Sections 12(2)(a) and (b) clearly do not apply in this case and neither party suggests they do. The only circumstance that may be relevant is s. 12(2)(c).

[40] Previous OIPC orders have found that background explanations "include, at least, everything factual that Cabinet used to make a decision" and have also said that analysis "includes discussion about the background explanations, but would not include analysis of policy options presented to Cabinet."[41] However, any information of a factual nature that is interwoven with any advice, recommendations or policy considerations would not be considered "background explanations or analysis" under s. 12(2)(c).[42]

[41] The Ministry submits that none of the information withheld under s. 12(1) "falls within the ambit of subsection 12(2) as none of the information is purely background information or analysis."[43]

---

[41] 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).
[42] Order No. 48-1995, July 7, 1995 at p. 13 and *Aquasource* at para. 49.
[43] Ministry's submission dated January 11, 2021 at para. 39.

[42] I can see there is some factual information in the records that was provided to a Cabinet committee in making a decision.[44] However, I conclude that s. 12(2)(c) does not apply to this information because it is interwoven with policy considerations or recommendations and, therefore, does not qualify as background explanations or analysis under s. 12(2)(c).

[43] In conclusion, I find the Ministry has established that it is required under s. 12(1) to refuse to disclose all of the Cabinet Submission and the Treasury Board Submission, but only parts of the letter. The Ministry also applied ss. 13(1) and 17(1) to withhold the information that I find s.12(1) does not apply to in the letter. Therefore, I will consider that information later below under those provisions.

Section 14 – solicitor client privilege

[44] The Ministry applied s. 14 to withhold information on one page of a timeline that captures the sequence of events related to a PavCo project involving the development of land around BC Place Stadium.[45]

[45] Section 14 states that a public body may refuse to disclose information that is subject to solicitor-client privilege. Section 14 encompasses both legal advice privilege and litigation privilege.[46] The Ministry claims legal advice privilege over the information withheld under s. 14. Legal advice privilege applies to confidential communications between a solicitor and client for the purposes of obtaining and giving legal advice.[47]

[46] I adopt the following three-part test as the analytical framework for determining whether legal advice privilege applies to the information in dispute:[48]

1. the communication must be between a solicitor and client;

2. entail the seeking or giving of legal advice; and

3. the parties must have intended it to be confidential.

[47] I also note the courts have found that solicitor-client privilege extends to communications that are "part of the continuum of information exchanged"

---

[44] For instance, information located on pp. 63-67.
[45] Information located on p. 19 of the records.
[46] *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para. 26
[47] *College* at paras. 26-31.
[48] *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 838, [1980] 1 SCR 821 at p. 13. The Ministry did not identify what test it applied to determine the information at issue is protected by legal advice privilege.

between the client and the lawyer in order to obtain or provide the legal advice.[49] The continuum also covers communications after the client receives the legal advice, such as internal client communications about the legal advice and its implications.[50]

Section 14 evidence

[48] The Ministry chose not to provide the information it is withholding under s. 14 for my review. Where a public body declines to provide the information or records withheld under s. 14, it is expected to provide a description of the information or records in a manner that, without revealing privileged information, enables the other parties and the adjudicator to assess the validity of the claim of privilege.[51]

[49] In this case, the Ministry did not provide a description of the information withheld under s. 14 or discuss its application of s. 14 in its inquiry submission. Instead, to support its position, the Ministry provided an affidavit from its Associate Deputy Minister which says:

> 18. The final item contained in the Timeline at page 19 of the records references legal advice. I believe this item is clear on its face that it is subject to solicitor client privilege and have therefore withheld it under s. 14 as well as s. 16 of FIPPA.

[50] This evidence does not help me adjudicate the Ministry's claim of privilege because it is an affiant's assertion and belief about whether solicitor-client privilege applies to the information at issue, which is the issue I must determine. Therefore, the Ministry must do more than merely assert privilege applies. It must tender sufficient evidence to prove on a balance of probabilities that the records are privileged.[52]

[51] Given the vital importance of solicitor-client privilege, I offered the Ministry an opportunity to provide further evidence to support its application of s. 14 to the disputed record.[53] The Ministry provided a further submission and an affidavit from JL, a lawyer with the Legal Services Branch, Ministry of Attorney General.[54] JL attests that he reviewed the information at issue and the "files in relation to the

---

[49] *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.
[50] Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District, 2013 BCSC 1893 at paras. 22-24.
[51] *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at para. 78.
[52] *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266. Order 19-21, 2019 BCIPC 23.
[53] Letter to Ministry dated August 25, 2021.
[54] Affidavit of JL at para. 1.

matters deposed to."[55] I conclude that I now have sufficient evidence to determine whether s. 14 applies.

Analysis and conclusions on s. 14

[52] The Ministry says it applied s. 14 to information that "refers to a legal opinion and provides information on the content of the legal opinion as it relates to two named Indigenous nations."[56] The lawyer, JL, confirms that the information at issue "refers to a legal opinion relating to specific Indigenous nations."[57] He also says the information "is in reference to a legal opinion provided by a lawyer in the [Indigenous Legal Group, Solicitor Unit] to an official in what is now the Ministry of Indigenous Relations and Reconciliation."[58] JL attests that the "disclosure of this information would reveal the substance of legal advice that was provided in confidence to the [Ministry of Indigenous Relations and Reconciliation].[59]

[53] I find that disclosing the information at issue would reveal legal advice that a government lawyer provided to a public body. Although JL is not the lawyer who provided the legal advice, I accept JL's evidence since he reviewed the information at issue and its related files and he is a lawyer that practices in the same area. Based on JL's evidence, I also accept that the parties intended their communications to be confidential. As a result, I conclude that s. 14 applies to the information at issue since disclosing this information would reveal legal advice provided by a government lawyer in confidence to a client Ministry.

Section 13(1) – advice and recommendations

[54] 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 minister. Previous OIPC orders recognize that s. 13(1) protects "a public body's internal 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."[60]

[55] 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. The term "recommendations" includes material that relates to a suggested course of action that will ultimately be accepted or

---

[55] Affidavit of JL at paras. 2-3.
[56] Ministry's letter dated September 3, 2021 at p. 2. The applicant did not make a specific submission regarding s. 14.
[57] Affidavit of JL at para. 4.
[58] Affidavit of JL at para. 5.
[59] Affidavit of JL at para. 6.
[60] For example, Order 01-15, 2001 CanLII 21569 at para. 22.

rejected by the person being advised and can be express or inferred.[61] Whereas, the term "advice" has a broader meaning than "recommendations."[62] "Advice" also includes an opinion that involves exercising judgment 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.[63]

[56] I also note that 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.[64]

[57] As well, s. 13(1) extends to factual or background information that is a necessary and integrated part of the advice.[65] 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.[66]

[58] If I find s. 13(1) applies, then the next step is to consider if any of the categories listed in ss. 13(2) or 13(3) apply. Subsections 13(2) and 13(3) identify certain types of records and information that may not be withheld under s. 13(1), such as factual material under s. 13(2)(a) and information in a record that has been in existence for 10 or more years under s. 13(3).

Information withheld under s. 13(1)

[59] The Ministry submits that s. 13(1) applies to some or all of the information in the following records:

- A 5-page document titled "Fiscal 2015/16 – Pavco Facilities Combined."[67] The Ministry disclosed most of the information in this document, but it withheld certain information in a timeline.[68]

[61] *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras. 23-24.
[62] *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 24.
[63] *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 at para. 113.
[64] Order 02-38, 2002 CanLII 42472 at para. 135. See also Order F17-19, 2017 BCIPC 20 (CanLII) at para. 19.
[65] *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52-53.
[66] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94.
[67] Pages 15-19 of the records.
[68] This information is located on p. 18 of the records under the entry "2010-December". The Ministry also applied s. 16(1) to this information.

- A 3-page document described by the Ministry as "Estimates Note Regarding Whitecaps."[69]

- An 8-page letter dated November 19, 2015 from the Assistant Deputy Minister of Finance and Management Services to PavCo's Chief Financial Officer.[70]

The parties' position on s. 13

[60] The Ministry says s. 13(1) applies to information withheld on one page of a timeline located in the document titled "Fiscal 2015/16 – Pavco Facilities Combined." The timeline captures the sequence of events related to a PavCo project involving the development of land around BC Place Stadium. The Ministry says that it withheld this information "to preserve and promote complete full and frank information to the Minister."[71] The Ministry did not discuss or provide any evidence about the other information that it withheld under s. 13(1).

[61] The applicant says none of the exceptions should apply as the records were created for use in a public forum.

Analysis and findings on s. 13(1)

[62] I have carefully reviewed the information withheld by the Ministry under s. 13(1) and I am not satisfied that this information reveals advice or recommendations developed by or for a public body or minister. For instance, the information withheld in the document titled "Fiscal 2015/16 – Pavco Facilities Combined" only reveals certain facts and decisions made during the development of land owned by PavCo.[72] I also find that the information withheld in the November 2015 letter only reveals instructions and directions to PavCo regarding "Budget 2015".

[63] Likewise, most of the information related to the Whitecaps[73] simply communicates information about a topic, which typically does not qualify as advice and recommendations under s. 13(1).[74] There is some information in this document that may be advice and recommendations, but it is not clear from that information alone or the record itself. The Ministry accepts that it bears the burden to prove s. 13(1) applies, but it did not explain or provide any context,

---

[69] Pages 26-28 of the records. The Ministry withheld the entire record and also applied ss. 17(1) and 21(1) to this information.
[70] Information located on p. 141 of the records. The Ministry applied ss. 12(1), 13(1) and 17 to the information withheld in this record. I found above that s. 12(1) does not apply to some of the information in this document; therefore, I will now consider whether s. 13(1) applies.
[71] Ministry's submission dated January 11, 2021 at para. 53.
[72] Information located on p. 18 of the records.
[73] Information located on pp. 26-28 of the records.
[74] Order F19-27, 2019 BCIPC 29 at para. 32, seventh bullet point, and the cases cited therein.

evidence or information to assist me in understanding how s. 13(1) applies to this information.

[64] As a result, it is not apparent that the information in these three records reveals information typically withheld under s. 13(1) such as a suggested course of action for a decision maker to consider or expert opinion on matters of fact on which a public body must make a decision. The Ministry also did not sufficiently explain how any advice or recommendations can be inferred from any of the withheld information. I conclude, therefore, that s. 13(1) does not apply to this information.

[65] For the reasons given, I conclude the Ministry is not authorized to withhold the information at issue under s. 13(1). Given my findings, I do not need to consider whether ss. 13(2) or (3) applies.

Section 16(1)(a) – harm to intergovernmental relations

[66] Section 16(1) of FIPPA authorizes public bodies to refuse access to information if disclosure could reasonably be expected to harm intergovernmental relations. The Ministry says s.16(1)(a)(iii) applies to information withheld on one page of a timeline that captures the sequence of events related to the development of land owned by PavCo around BC Place Stadium.[75]

[67] Section 16(1)(a)(iii) protects information that if disclosed could reasonably be expected to harm the conduct of relations between the BC government and an "aboriginal government". The standard of proof applicable to harms-based FIPPA exceptions like s. 16(1) is whether disclosure of the information could reasonably be expected to cause the specific harm.[76] The Supreme Court of Canada has described this standard as "a reasonable expectation of probable harm" which it says is "a middle ground between that which is probable and that which is merely possible."[77]

[68] The public body 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" or "considerably above" the

[75] This information is located on p. 18 of the records. The Ministry applied both ss. 13(1) and 16(1) to the information found under the entry "2010-December". I previously found s. 13(1) did not apply to this information.
[76] Order F17-28, 2017 BCIPC 30 at para. 49.
[77] *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).

simply possible or speculative in order to reach that middle ground.[78] It must also 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."[79]

[69] The Ministry submits that the standard of proof for s. 16 is less than other harms-based FIPPA exceptions such as s. 17 (harm to a public body's financial or economic interest).[80] It argues, for a variety of reasons, that "the quantity and quality of evidence required to demonstrate a valid application of section 16 should be relatively modest and should involve both subjective and objective elements."[81] However, I am not convinced by the Ministry's arguments that a different approach to s. 16 should apply. I am not aware of any legal authority that supports the Ministry's interpretation that s. 16 should have a lower standard of proof than FIPPA's other harm-based exceptions.

[70] Instead, the Supreme Court of Canada has expressly said that the "reasonable expectation of probable harm" standard "should be used wherever the 'could reasonably be expected to' language is used in access to information statutes."[82] The Supreme Court noted that the amount and quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and the "inherent probabilities or improbabilities or the seriousness of the allegations or consequences."[83] Therefore, there may be cases where it is clear that the disclosure of the information at issue could reasonably be expected to harm intergovernmental relations.[84] However, the analysis is contextual and each determination is fact-specific.

Parties' position on s. 16(1)(a)(iii)

[71] The Ministry submits that disclosure of the withheld information would harm the BC government's relations with an "aboriginal government" in accordance with s. 16(1)(a)(iii). It says the information at issue relates "to sensitive negotiations with First Nations groups" and reveals "the development of provincial policies" and "provincial negotiating positions."[85]

---

[78] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54. *Merck Frosst Canada Ltd. V. Canada (Health),* 2012 SCC 3 at para. 196.
[79] *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.
[80] Ministry's submission dated January 11, 2021 at para. 75.
[81] Ministry's submission dated January 11, 2021 at para. 74.
[82] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.
[83] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.
[84] For example, Order F20-50, 2020 BCIPC 59 (CanLII).
[85] Ministry's submission dated January 11, 2021 at paras. 82-83.

[72] The Ministry argues that "while the information is provided incidentally and in a cursory fashion in the context of a timeline, it is the Ministry's view that the lack of context and explanation is problematic and could reasonably be expected to harm government relations between the Ministry and aboriginal governments."[86]

[73] The applicant does not believe any harm will result from disclosing the information at issue. However, if any harm existed in "2016", the applicant submits that any alleged harm would no longer exist today "due to the passage of time."[87]

Does the information at issue involve an "aboriginal government"?

[74] To determine whether s. 16(1)(a)(iii) applies, I must first consider whether the information at issue involves an "aboriginal government". Schedule 1 of FIPPA defines the term "aboriginal government" as meaning "an aboriginal organization exercising governmental functions." Previous OIPC orders have found that the term "aboriginal government" includes a "band" as defined in the federal *Indian Act* and is also not limited to bands or groups that have concluded self-government agreements or treaties.[88]

[75] In the timeline, the Ministry disclosed the identities of three First Nations, but withheld information related to them. The Ministry submits that "when considering whether an entity is an 'aboriginal government' for the purposes of FIPPA, and therefore exercises 'governmental functions', the focus should be on whether the organization has the ability to negotiate on behalf of rights' holders".[89] The Ministry does not explain how its interpretation of the term "aboriginal government" applies to the facts in this case.

[76] However, I am aware that a previous OIPC order determined that an organization qualified as an "aboriginal government" because, among other things, there was evidence that it "has independently negotiated a number of agreements with the Province and the Government of Canada" on behalf of its members.[90]

[77] In the present case, the Ministry openly disclosed information in the timeline that indicates the three First Nations are involved in negotiations with the Province on behalf of its members. I am, therefore, satisfied that these First Nations are "aboriginal organizations" exercising governmental functions. As a result, I find that each of these First Nations qualify as an "aboriginal

---

[86] Ministry's submission dated January 11, 2021 at para. 82.
[87] Applicant's submission at para. 12.
[88] Order 01-13, 2001 CanLII 21567 at para. 14, citing Order No. 14-1994, [1994] BCIPCD No. 17.
[89] Ministry's submission dated January 11, 2021 at para. 58.
[90] Order F20-50, 2020 BCIPC 59 (CanLII) at para. 25.

government" under s. 16(1)(a)(iii) based on FIPPA's definition and how past OIPC orders have interpreted that term.

Harm to the conduct of relations between governments

[78] The final question under s. 16(1)(a)(iii) that I must address is whether disclosure of the withheld information could reasonably be expected to harm the provincial government's conduct of relations with the three "aboriginal" governments. Based on the materials before me, I conclude the Ministry has not established how the disclosure of the withheld information could reasonably be expected to damage the Province's relationship with these "aboriginal" governments. Aside from its assertions, the Ministry does not sufficiently explain nor does it provide evidentiary support for its position.

[79] For instance, the Ministry says disclosing the withheld information would reveal the Province's negotiating position on a matter, but it does not explain. It is not apparent how this information could reasonably be expected to harm relations between the BC government and an "aboriginal" government. None of this information appears particularly sensitive or contentious. It may reveal the Province's negotiating position, but it is unclear how knowing this information could reasonably be expected to damage relations or create harmful misunderstandings with the "aboriginal" governments involved in the matter. I conclude, therefore, that the Ministry has not established a direct link between the disclosure of the information at issue and the harm that the Ministry alleges could occur.

[80] As another example, the Ministry says the withheld information reveals "sensitive negotiations with First Nations groups."[91] However, I note that some of the information the Ministry now seeks to protect was disclosed elsewhere in the records or can be easily inferred from information already disclosed in the timeline.[92] 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 could reasonably be expected to now result in the alleged harm. Therefore, for the reasons given, I conclude the Ministry has not proven that s. 16(1)(a)(iii) applies in this case.

Section 17(1) – harm to a public body's financial or economic interest

[81] Section 17(1) authorizes a public body to refuse to disclose information that, if disclosed, could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia. Subsections (a) to (f) of s. 17(1) provide a non-exhaustive list of the kinds of

[91] Ministry's submission dated January 11, 2021 at paras. 82-83.
[92] For example, information located on pp. 18, 21 and 38 of the records.

information that, if disclosed, could reasonably be expected to cause harm to the financial or economic interests of a public body.

[82] Previous OIPC orders have determined, however, that it is not enough for a public body to meet the requirements of one of the circumstances in ss. 17(a) through (f). A public body must also demonstrate that disclosure could reasonably be expected to result in financial or economic harm to a public body.[93]

[83] In terms of the standard of proof for s. 17(1), as was the case with s. 16(1), it is well-established that the language "could reasonably be expected to" in access to information statutes means that in order to rely on the exception, a public body must establish that there is a "reasonable expectation of probable harm."[94]

[84] As previously noted, 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.[95] Further, it 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."[96]

[85] The Ministry withheld the following information or records under s. 17(1):

- A cell phone number.[97]
- Information in a document titled "Fiscal 2015/16 – Pavco Facilities Combined."[98]
- A document described by the Ministry as "Estimates Note Regarding Whitecaps."[99]

---

[93] Order F19-03, 2019 BCIPC 4 (CanLII) at para. 22.
[94] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.
[95] *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3 at paras. 196 and 206.
[96] *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3 at para. 219.
[97] Information located on pp. 2, 4 and 220 of the records. The Ministry only applied s. 17 to this information. It did not apply s. 22(1), but I considered whether s. 22(1) may apply and find that it does not since this information would qualify as "contact information."
[98] This information is located on p. 18 of the records. The Ministry applied both ss. 16(1)(a)(iii) and 17(1) to the same information. I found previously that s. 16(1)(a)(iii) did not apply.
[99] Pages 26-28 of the records. The Ministry applied both ss. 13(1) and 17(1) to the same information. I found above that s. 13(1) did not apply.

- A letter from the Assistant Deputy Minister of Finance and Management Services to PavCo's Chief Financial Officer.[100]

[86] The Ministry accepts that it has the burden of proving that the information is properly withheld under s. 17(1), but it did not provide argument or evidence to support its position on s. 17(1). Instead, the Ministry relies on PavCo to make the case and says it refers any submissions relating to the application of s. 17(1) to PavCo.[101]

[87] I find the Ministry has not met its burden of proving that disclosing the information in dispute could reasonably be expected to cause harm under s. 17(1). The Ministry relied on a third party's argument and evidence to make its case under this provision; however, PavCo did not make a submission or provide any evidence to show that s. 17(1) applies to the information at issue. As a result, I conclude the Ministry is not authorized to withhold the information at issue under s. 17(1).

Section 21(1) – disclosure harmful to third-party business interests

[88] Section 21(1) of FIPPA requires public bodies to refuse to disclose information that could reasonably be expected to harm the business interests of a third party.[102] The Ministry applied s. 21(1) to information related to PavCo and the Whitecaps. I previously found the Ministry was not authorized to withhold this information under ss. 13(1) and 17(1) and will now consider whether s. 21(1) applies.

[89] Past jurisprudence has established the principles for determining whether s. 21(1) applies to information.[103] The party resisting disclosure must first demonstrate that disclosing the information at issue would reveal the type of information listed in s. 21(1)(a). Next, it must show that this information was supplied, implicitly or explicitly, in confidence to the public body under s. 21(1)(b). Finally, it must establish that disclosure of the information could reasonably be expected to cause one or more of the harms set out in s. 21(1)(c). All three elements must be met in order for the information in dispute to be properly withheld under s. 21(1).

---

[100] Information located on p. 141 of the records. The Ministry applied ss. 12(1), 13(1) and also s. 17(1) to the same information. I found above that ss. 12(1) and 13(1) did not apply to some of the information in this document.
[101] Ministry's submission dated January 11, 2021 at paras. 12 and 96 and Affidavit of KR at para. 8.
[102] Schedule 1 of FIPPA defines a "third party" to mean "any person, group of persons or organization other than (a) the person who made the request, or (b) a public body." It is not in dispute that the Whitecaps FC is a third party under FIPPA.
[103]. See for example, Order F17-14, 2017 BCIPC 15 at para. 9 and *Vancouver Whitecaps FC LP v. British Columbia (Information and Privacy Commissioner)*, 2020 BCSC 2035.

Section 21(1)(a): Does it reveal third-party commercial information?

[90] Section 21(1)(a)(ii) applies to commercial information of, or about, a third party. FIPPA does not define "commercial information." However, previous OIPC orders have determined that "commercial information" relates to a commercial enterprise such as the "offers of products and services a third-party business proposes to supply or perform" and the "methods a third-party business proposes to use to supply goods and services."[104]

[91] The record at issue is a document described by the Ministry as "Estimates Note Regarding Whitecaps."[105] The Ministry says the information withheld under s. 21(1) relates to the "business interests" of the Whitecaps.[106] However, neither the Ministry nor the third parties explain how disclosing the information at issue would reveal the type of information listed in s. 21(1)(a).

[92] Based on my review of the disputed record, I conclude most of the information at issue qualifies as commercial information under s. 21(1) since it relates to the buying, selling, exchanging or providing of goods and services between PavCo and the Whitecaps. This information reveals details of a business matter between PavCo and the Whitecaps.

[93] However, there is some information that is not commercial information nor does it qualify as any of the other types of information listed in s. 21(1)(a). This information consists of page numbers, the document title and the names and phone numbers of certain individuals provided for contact purposes. It is not clear how any of this information falls within s. 21(1)(a).

Section 21(1)(b): Was the information supplied in confidence?

[94] Having found some of the information at issue qualifies as commercial information under s. 21(1)(a), the next step is to consider s. 21(1)(b). Section 21(1)(b) requires the information to be supplied implicitly or explicitly in confidence. This involves a two-part analysis. It is first necessary to determine whether the third party supplied the information to the public body. If so, then the second part of the analysis is to determine whether the third party supplied the information, implicitly or explicitly, in confidence.[107]

[95] Previous OIPC orders have found information to be supplied under s. 21(1)(b) where the information "was not Ministry-generated,

---

[104] Order F09-17, 2009 CanLII 59114 at para. 17; Order F16-39, 2016 BCIPC 43 at para. 17; Order F07-06, 2007 CanLII 9597 at para. 20.
[105] Pages 26-28 of the records.
[106] Ministry's submission dated January 11, 2021 at para. 12.
[107] See Order F15-71, 2015 BCIPC 77 at para. 11.

- derived, -negotiated or agreed-to information."[108] Previous orders have also found information to be supplied if the third party provided the information and there was no evidence that the public body had modified or agreed to accept the information as part of a negotiation.[109]

[96] In terms of confidentiality, the test for whether a third party supplied information in confidence is objective. It must be shown that the information was supplied under an objectively reasonable expectation of confidentiality by the supplier of the information at the time the information was provided; evidence of the supplier's subjective intentions alone with respect to confidentiality is insufficient.[110]

[97] The Ministry accepts that it has the burden of proving that the information in the disputed record is properly withheld under s. 21(1), but it relies on the third parties to make the case.[111] None of the third parties provided any submissions or evidence on the matters to be considered under s. 21(1). As a result, I conclude the Ministry has not met its burden of proving that the information was supplied in confidence under s. 21(1)(b).

Section 21(1)(c): Is there a reasonable expectation of probable harm?

[98] The Ministry has not proven that the disputed information meets the "supplied in confidence" test under s. 21(1)(b); therefore, it is not necessary for me to consider whether disclosing the information at issue could reasonably be expected to result in harm under s. 21(1)(c). However, for completeness, I find the Ministry has not proven that disclosing the information in dispute could reasonably be expected to cause harm under s. 21(1)(c). The Ministry relied on the third party's argument and evidence in this inquiry; however, as noted, none of the third parties provided any submissions or evidence on the matters to be considered under s. 21(1). As a result, I conclude the Ministry is not authorized to withhold the information at issue under s. 21(1).

Section 22 – unreasonable invasion of third-party personal privacy

[99] Section 22(1) of FIPPA provides that a public body must refuse to disclose personal information the disclosure of which would unreasonably invade a third party's personal privacy. Previous OIPC orders have considered the application of s. 22(1) and I will apply the same approach in this inquiry.

---

[108] Order 04-08, 2004 CanLII 34262 (BC IPC) at para. 33
[109] Order F13-01, 2013 BCIPC 1 at paras. 36-38.
[110] Order 01-36, 2001 CanLII 21590 at para. 23 and Order 01-39, 2001 CanLII 21593 (BC IPC) at para. 28.
[111] Ministry's submission dated January 11, 2021 at para. 12 and affidavit of KR at paras. 8 and 9.

Personal information

[100] The first step in any s. 22 analysis is to determine if the information is personal information. The Ministry has the burden of proving the information at issue qualifies as personal information.[112] Personal information" is defined in FIPPA as "recorded information about an identifiable individual other than contact information."[113] 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.[114]

[101] The Ministry says the information at issue includes the names of individuals and personal contact information. It explains that the "information appears in the context of correspondence relating to a complaint made to the Association of Professional Engineers and Geoscientists of British Columbia."[115]

[102] I am satisfied some of the information withheld by the Ministry under s. 22(1) is the personal information of two third parties. The Ministry withheld a third party's name and email address and another third party's name, signature, job title and residential address.[116] I find all of this information is about identifiable individuals.

[103] I am also satisfied that this information does not qualify as contact information. Contact information is defined in FIPPA 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."[117] I can see from the context in which this information appears in the records that the information is not for work contact purposes. Therefore, I conclude the information at issue is personal information and not contact information.

Section 22(4) – disclosure not an unreasonable invasion

[104] 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 not an unreasonable invasion of a third party's personal privacy and the information cannot be withheld under s. 22(1).

---

[112] Order 03-41, 2003 CanLII 49220 (BCIPC) at paras. 9–11.
[113] Schedule 1 of FIPPA.
[114] Order F16-36, 2016 BCIPC 40 (CanLII) at para. 17.
[115] Ministry's submission dated January 11, 2021 at para. 84.
[116] Information withheld on pp. 155-158 of the records.
[117] Schedule 1 of FIPPA.

[105] The Ministry submits that none of the circumstances set out in s. 22(4) applies to the personal information at issue. The applicant did not make submissions about s. 22(4).

[106] I considered whether s. 22(4)(e) applies to the information in dispute. Section 22(4)(e) provides that the disclosure of personal information about a public body employee's position, functions or remuneration is not an unreasonable invasion of that third party's personal privacy. One of the third parties previously worked for PavCo and would, therefore, qualify as a public body employee during their employment with PavCo.[118] The question then is whether the information at issue is about that third party's position or function for the purposes of s. 22(4)(e).

[107] The personal information at issue includes the third party's name and position with PavCo. Previous OIPC orders have found that s. 22(4)(e) applies to information in the disputed records that reveals a public body employee's name, job title, duties, functions, remuneration (including salary and benefits) or position.[119] However, whether s. 22(4)(e) applies in a particular case depends on the context in which the information at issue appears. Past OIPC orders have found that s. 22(4)(e) did not apply to a third-party employee's name and title because it appeared in the context of a workplace investigation.[120]

[108] Although the information at issue does not involve a workplace investigation, the Ministry explains that this information appears in the context of a complaint made to the Association of Professional Engineers and Geoscientists of BC and "would expose the identity of the individual(s) connected to the complaint."[121]

[109] I agree with the Ministry that disclosing the name and previous job title of this third party would reveal the identity of a person connected to a work safety complaint. The third party's name and job title appear in a letter written by that third party where he alleges PavCo was negligent regarding certain safety concerns involving BC Place Stadium. Therefore, given the context in which this information appears in the disputed record, I do not find s. 22(4)(e) applies in this case.

[110] I have considered the other types of information and circumstances listed under s. 22(4) and also find that none apply.

---

[118] PavCo is designated as a "public body" under schedule 2 of FIPPA.
[119] Order F20-54, 2020 BCIPC 63 (CanLII) at para. 56 and footnote 45. Order F14-41, 2014 BCIPC 44 (CanLII) at para. 22, citing Order 02-56, 2002 CanLII 42493 (BCIPC) at para. 63.
[120] For example, Order 01-53, 2001 CanLII 21607 (BC IPC) at para. 40.
[121] Ministry's submission dated January 11, 2021 at para. 84.

Section 22(3) – presumptions in favour of withholding

[111] 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.[122]

[112] The Ministry submits that disclosing the information at issue is presumed to be an unreasonable invasion of third-party personal privacy under s. 22(3)(d) since it relates to a third party's employment history. The applicant did not make submissions about s. 22(3) or address the Ministry's arguments about the presumption under s. 22(3)(d).

Employment history – s. 22(3)(d)

[113] Section 22(3)(d) creates a rebuttable presumption against disclosure where the personal information relates to the employment, occupational or educational history of a third party. The Ministry submits s. 22(3)(d) applies because the personal information at issue "arises in relation to the employment history of the individuals named in the records at issue."[123]

[114] I am satisfied that s. 22(3)(d) applies to a third party's name and job title since that information relates to this third party's employment history.[124] The information reveals that the third party was formerly employed in a certain job.

[115] However, I find the presumption under s. 22(3)(d) does not apply to the rest of the withheld information. This information reveals a third-party's name, email address, signature and a residential address. It is not apparent, and the Ministry does not sufficiently explain, how this personal information relates to a third-party's employment history.

[116] Previous OIPC orders have found that the term "employment history" applies to the contents of a resume or a personnel file, the details of disciplinary action taken against employees, performance appraisals of employees and information relating to investigations into workplace behaviour.[125] The remaining information at issue is not related to any of those circumstances or materials. For instance, there is no indication that the personal information withheld in these records was part of an investigation into a workplace complaint or a disciplinary

---

[122] *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.
[123] Ministry's submission dated January 11, 2021 at para. 91.
[124] Information located on p. 157 of the record.
[125] Order F14-41, 2014 BCIPC 44 (CanLII) at paras. 45-46. Order F10-21, 2010 BCIPC 32 (CanLII) at paras. 23-24. Order 01-53, 2001 CanLII 21607 at para. 32.

matter involving a third party or was part of a third-party's employee file. Therefore, I am not satisfied that the remaining personal information relates to a third-party's employment history for the purposes of s. 22(3)(d).

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

Section 22(2) – relevant circumstances

[118] 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. Section 22(2) requires a public body to consider the circumstances listed under ss. 22(2)(a) to 22(2)(i) and any other relevant circumstances.

[119] The Ministry submits that a relevant s. 22(2) circumstance is that the disclosure may unfairly damage the reputation of the third parties in accordance with s. 22(2)(h). I will consider this circumstance below in my s. 22(2) analysis.

[120] The applicant did not identify any s. 22(2) or other relevant circumstances for consideration. However, I have considered whether there are any other circumstances, including those listed under s. 22(2), that may apply. Based on my review of the withheld information, I find s. 22(2)(f) is a relevant circumstance as some of the information at issue may have been supplied in confidence.

Unfair damage to reputation - s. 22(2)(h)

[121] Section 22(2)(h) requires a public body to consider whether disclosure of personal information may unfairly damage a third party's reputation. The Ministry submits that "disclosure of the personal information contained in the letters could unnecessarily expose the individuals to reputational harm, given that disclosure of information in response to an information access is disclosure unto [the] world."[126]

[122] Based on the materials before me, I am not satisfied s. 22(2)(h) applies to the information at issue. The Ministry does not sufficiently explain or provide evidence as to how the withheld information may cause unfair reputational harm to any of the third parties. It is also not clear from reviewing the information at issue that disclosure may unfairly damage a third party's reputation since, in my opinion, none of the information in the records at issue reflects poorly on any of the third parties. The information at issue would only reveal that two third parties reported what they considered legitimate safety concerns about BC Place Stadium. I, therefore, find s. 22(2)(h) is not a factor that weighs in favour of withholding the information at issue.

[126] Ministry's submission dated January 11, 2021 at para. 93.

Supplied in confidence – s. 22(2)(f)

[123] Section 22(2)(f) requires a public body to consider whether the personal information at issue was supplied in confidence. Previous OIPC orders have typically found that complainant information is usually supplied in confidence.[127]

[124] In the present case, the information at issue would reveal the identities of two individuals who made complaints regarding PavCo and its operation of BC Place Stadium. I find it reasonable to conclude in this case that these third parties expected their identities to be protected. I, therefore, find the fact that the records at issue contain information that reveals the identity of two third-party complainants weighs in favour of non-disclosure.

Conclusion on s. 22(1)

[125] Considering all the relevant circumstances, I am satisfied that disclosing the personal information at issue would unreasonably invade a third party's personal privacy. I found the presumption under s. 22(3)(d) applies to some of the information since it reveals a third party's employment history. I considered whether there were any circumstances to rebut this presumption and could find none.

[126] I also considered whether there were any factors that would weigh in favour of disclosing the personal information at issue to the applicant and could find none. Instead, I conclude the information at issue should be withheld since it was supplied in confidence in accordance with s. 22(2)(f). In conclusion, the Ministry must refuse to disclose the information at issue under s. 22(1).

CONCLUSION

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

1. Subject to item 4 below, I require the Ministry to refuse access to part of the records withheld under s. 12(1).

2. I confirm the Ministry's decision to refuse access to the information withheld in the record under s. 14.

3. I require the Ministry to refuse access to the information withheld in the records under s. 22(1).

[127] Order F15-29, 2015 BCIPC 32 at para. 43.

4. The Ministry is not authorized or required by ss. 12(1), 13(1), 16(1)(a)(iii), 17(1) and 21(1) to withhold the information highlighted in a copy of the records provided to the Ministry with this order.

5. I require the Ministry to give the applicant access to all or part of the records that it is not authorized or required to withhold. The Ministry must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, along with a copy of the relevant records.

[128] 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 November 16, 2021.

October 1, 2021

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

OIPC File No.: F17-68809