



Order F22-13

## MINISTRY OF TRANSPORTATION AND INFRASTRUCTURE

Lisa Siew  
Adjudicator

March 8, 2022

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**Summary:** An applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to an agreement between the Ministry of Transportation and Infrastructure (Ministry) and two named individuals, along with other related documents. The Ministry withheld the entire agreement on the basis it was protected by settlement privilege, but provided the applicant with partial access to other records by withholding information under s. 22(1) of FIPPA (unreasonable invasion of third-party personal privacy). The adjudicator determined the Ministry was not authorized to withhold the agreement on the basis of settlement privilege, but that it was required to withhold the agreement under s. 22(1). The adjudicator also found the Ministry was required to withhold most of the remaining information at issue under s. 22(1). The Ministry was ordered to disclose the information that it was not required to withhold under s. 22(1).

**Statute Considered:** *Freedom of Information and Protection of Privacy Act*, s. 22(1), 22(2), 22(2)(a), 22(2)(e), 22(2)(f), 22(3), 22(3)(f), 22(4), 22(4)(e). Schedule 1 (definitions of “employee” and “service provider”).

## INTRODUCTION

[1] An applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to an agreement between the Ministry of Transportation and Infrastructure (Ministry) and two named individuals (Third Parties) relating to the sale of the Third Parties’ property. The applicant was interested in any information regarding the “placement, location, compensation or design” of his driveway in a copy of this agreement, including “any reference, contract, emails, memos or notes.”<sup>1</sup> The applicant further specified that he was

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<sup>1</sup> Applicant’s revised access request dated August 28, 2019.

only interested in obtaining access to the agreement where it acknowledges or concerns “the placement, location, compensation or designs of his access.”<sup>2</sup>

[2] The Ministry interpreted the applicant’s access request as asking for:

1. A copy of the “Offer to Purchase” between the Third Parties and the Ministry (Agreement); and
2. Any references to the placement of the applicant’s driveway in contracts, emails or notes.<sup>3</sup>

[3] Based on this interpretation, the Ministry refused to provide the applicant with access to a copy of the requested Agreement on the basis it is protected by settlement privilege. The Ministry provided the applicant with partial access to some emails and notes, but withheld information under s. 22(1) of FIPPA (unreasonable invasion of third-party personal privacy).

[4] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the Ministry’s decision. The OIPC’s investigation and mediation process did not resolve the issues between the parties and the matter proceeded to a written inquiry. The applicant and the Ministry provided inquiry submissions. During the inquiry, the Ministry reconsidered its severance of the records and released additional information to the applicant; therefore, that information is no longer at issue.

[5] Both the Ministry and the OIPC notified the Third Parties about the inquiry. The Ministry informed the Third Parties that their Agreement with the Ministry was a responsive record in the inquiry.<sup>4</sup> Pursuant to s. 54, the OIPC invited the Third Parties to participate in the inquiry and they did so by providing submissions.<sup>5</sup>

## **PRELIMINARY MATTERS**

### *Whether s. 22(1) applies to the Agreement*

[6] In their inquiry submissions, the Third Parties argue that s. 22(1) applies to their Agreement with the Ministry.<sup>6</sup> The Ministry did not withhold any of the information in the Agreement under s. 22(1), but it did provide submissions as to whether s. 22(1) applies to this record.

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<sup>2</sup> Applicant’s revised access request dated August 28, 2019.

<sup>3</sup> Ministry’s submission dated January 25, 2022 at para. 12.

<sup>4</sup> Ministry letter to Third Parties dated February 23, 2021.

<sup>5</sup> OIPC letter to Third Parties dated March 5, 2021.

<sup>6</sup> Third Parties’ submission dated November 8, 2021 at p. 3.

[7] Although the Ministry did not apply s. 22(1) to the Agreement, s. 22 is noted in the fact report and the notice of inquiry as an issue in this inquiry. I can also determine from the parties' materials that the issue of whether s. 22(1) applies to the Agreement is relevant to this inquiry.

[8] The applicant also had an opportunity to respond to the Third Parties' submissions regarding s. 22 and the Agreement. The applicant says he is not interested in the Agreement or knowing how much the Third Parties received for their property, unless it shows that the placement or access to his driveway was a part of their negotiations and transaction.<sup>7</sup>

[9] Taking all of this into account, I find it appropriate in these circumstances to consider whether the information in the Agreement can be withheld under s. 22(1).

*A complaint under s. 6(1)*

[10] Under s. 6(1) of FIPPA, public bodies are required to make every reasonable effort to respond without delay to each applicant openly, accurately and completely. In his inquiry submissions, the applicant contends the Ministry did not conduct an adequate search for records. The applicant submits the Ministry failed to produce relevant records, including records from several named individuals, and that those records must exist.<sup>8</sup>

[11] The Ministry objects to the applicant raising this additional matter. In accordance with OIPC policy, the Ministry says that it is not appropriate at this late stage for the applicant to allege that the Ministry failed to conduct a proper search for records in this inquiry.<sup>9</sup>

[12] Section 6(1) was not identified as an issue in the fact report or in the notice of inquiry. As described in the notice of inquiry sent to all the parties, the investigator's fact report sets out the issues for the inquiry. As well, previous OIPC orders have consistently said parties may raise new issues at the inquiry stage only if they request and receive permission to do so.<sup>10</sup> The applicant did not seek permission to add this issue to the inquiry or explain why he should be permitted to do so at this late stage.

[13] Further, where an applicant complains that a public body has not performed a duty under FIPPA, the OIPC requires the applicant to raise the issue with the public body first to allow the public body an opportunity to respond and attempt to resolve the complaint, prior to making a complaint to the OIPC. There

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<sup>7</sup> Applicant's submission dated November 29, 2021 at pp. 1 and 3.

<sup>8</sup> Applicant's submissions dated November 29, 2021 and February 7, 2022.

<sup>9</sup> Ministry's submission dated December 21, 2021 at para. 11.

<sup>10</sup> For example, Order F19-41, 2019 BCIPC 46 at para. 5.

is no evidence that the parties first attempted to resolve this matter between themselves. Additionally, once the OIPC has accepted a complaint, it is usually investigated and resolved by a case review officer or an investigator and not at a formal inquiry.

[14] For the reasons stated above, I decline to add s. 6(1) to this inquiry. However, the applicant has the option of submitting a written complaint to the public body and allowing the public body an opportunity to resolve the complaint. If the applicant is not satisfied with the public body's response, then the applicant may seek a resolution through the OIPC's complaint process.

### **ISSUES AND BURDEN OF PROOF**

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

1. Is the Ministry authorized to refuse to disclose the information at issue on the basis it is protected by settlement privilege?
2. Is the Ministry required to refuse to disclose the information at issue under s. 22(1)?

[16] Burden of proof for s. 22 of FIPPA: Section 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).<sup>11</sup>

[17] Burden of proof for settlement privilege: The burden is on the Ministry, as the asserting party, to prove that settlement privilege applies.<sup>12</sup>

[18] The parties' submissions include other matters not set out in the OIPC investigator's fact report or the notice of inquiry. For example, the parties accuse each other of various wrongdoings and the applicant's submission includes allegations of misconduct against Ministry employees related to a highway improvement project. I do not have the jurisdiction to determine those matters. I will only refer to those submissions where it is necessary or relevant to the issues in this inquiry. To be clear, the issues I will decide in this inquiry are limited to those identified above.

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<sup>11</sup> Order 03-41, 2003 CanLII 49220 (BCIPC) at paras. 9–11.

<sup>12</sup> *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd.*, 2007 BCSC 143 at para. 104. The Ministry agrees that it bears this burden of proof: Ministry's submission dated November 9, 2021 at para. 13.

## DISCUSSION

### ***Background***<sup>13</sup>

[19] In or around 2009, the Ministry commenced a highway improvement project (Project). The Project's scope included the widening of the highway and intersection improvements. To complete the Project, the Ministry needed to acquire privately-owned land.

[20] The Third Parties agreed to transfer a portion of their land to the Province, for the purposes of the Project, based upon an agreed purchase price and other terms and conditions. The parties formalized their arrangement by entering into and signing the Agreement.

[21] The applicant owned land and operated a business adjacent to the proposed highway improvements and near the Third Parties' property. Before the commencement of the Project, the Ministry was in negotiations with a number of property owners, including the applicant, about managing access to their properties from the improved highway.

[22] The Ministry and the applicant's negotiations included discussions about the relocation and placement of the applicant's driveway, including an option to move the applicant's driveway to a location directly across from the Third Parties' driveway. The Ministry did not pursue that option and a dispute arose between the parties because of the Ministry's actions concerning the applicant's driveway and other matters. The applicant filed a lawsuit against the Province as a result of issues arising out of the Project.

### ***Records at issue***

[23] The records in dispute total 25 pages and consist of the 20-page Agreement and five pages of emails, email chains and notes.

### ***Settlement privilege***

[24] The Ministry withheld the entire Agreement on the basis it is protected by settlement privilege. Settlement privilege is not an exception to an applicant's right of access to a record under Part 2 of FIPPA.<sup>14</sup> However, the BC Supreme Court has determined that public bodies may rely on settlement privilege as a basis to withhold information because FIPPA does not contain express

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<sup>13</sup> The information in the background section is compiled from the parties' submissions and evidence and information disclosed in the records.

<sup>14</sup> Section 4 of FIPPA gives applicants a right of access to a record in the custody or control of a public body subject only to the exceptions to disclosure in Division 2, Part 2 of FIPPA. Division 2 does not provide an exception for settlement privilege.

language abrogating settlement privilege.<sup>15</sup> As a result, the OIPC has decided a number of cases where public bodies have relied on settlement privilege to withhold information in response to an access request.<sup>16</sup>

[25] Settlement privilege is a fundamental common law rule that protects communications and documents exchanged by parties as they try to settle a dispute, including the “content of successful negotiations” such as the concluded agreement and any monetary amount negotiated.<sup>17</sup> The purpose of settlement privilege is to promote settlement and it allows parties “to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation.”<sup>18</sup> Settlement privilege is based on the idea that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed.<sup>19</sup>

[26] The test for determining whether settlement privilege applies has been articulated by the courts and applied in previous OIPC orders. It requires the following conditions be present for the privilege to apply:

1. A litigious dispute must be in existence or within contemplation (although it is not necessary for proceedings to have actually been commenced);
2. The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and
3. The purpose of the communication must be to attempt to effect a settlement of the dispute between the parties.<sup>20</sup>

[27] If these three conditions are satisfied, then there is a presumption of non-disclosure, subject to certain exceptions which may be found “when the justice of the case requires it.”<sup>21</sup> I will consider whether these conditions are satisfied and, if so, whether there are any exceptions that may apply.

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<sup>15</sup> *Richmond (City) v. Campbell*, 2017 BCSC 331 at paras. 71-73. See also Order F17-35, 2017 BCIPC 37 at paras. 22-69.

<sup>16</sup> For example, Order F17-35, 2017 BCIPC (CanLII).

<sup>17</sup> *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 [*Sable*] at paras. 16-18.

<sup>18</sup> *Sable* at paras. 2 and 11.

<sup>19</sup> *Sable* at para. 13.

<sup>20</sup> Order F17-35, 2017 BCIPC 37 at para. 25 and *Nguyen v. Dang*, 2017 BCSC 1409 at para. 22. This test is accepted and cited by the Ministry at para. 86 of its November 9, 2021 submission.

<sup>21</sup> Order F17-35, 2017 BCIPC 37 at para. 28, quoting *Sable* at para. 12.

### Was there a litigious dispute?

[28] To satisfy the “litigious dispute” requirement, the courts have found that the parties only need to be “in a dispute or negotiation” rather than “the arguably more rigorous requirement that a ‘litigious dispute’ be either in existence or contemplated.”<sup>22</sup> However, this more expansive test does not apply to any typical negotiation such as the regular back and forth that occurs during a “commercial negotiation aimed at establishing a contract.”<sup>23</sup> It instead requires evidence of a negotiation related to a “dispute to be settled” or a “pending dispute.”<sup>24</sup>

#### *Parties’ submissions on litigious dispute*

[29] The Ministry says the Agreement was created when the parties were in a dispute or negotiation about the acquisition of the Third Parties’ property. It submits that the Agreement reflects the contents of those “successful negotiations.”<sup>25</sup> The Ministry states that its policy and procedures dictate that “court proceedings would likely have commenced pursuant to the provisions of the *Expropriation Act*” if the parties were not able to reach an agreement.<sup>26</sup>

[30] In support of its position, the Ministry provided an affidavit from one of its management-level employees (Manager). The Manager describes the Ministry’s general practice for acquiring private property that is required for transportation projects.<sup>27</sup> The Manager says the Ministry usually uses a property negotiation agent as its representative in negotiations with property owners.

[31] The Manager emphasizes that expropriation is only carried out in rare circumstances and always considered a last resort.<sup>28</sup> She says that Ministry policy is to vigorously pursue a consensual agreement at a reasonable price. The Manager also explains that the Ministry has other options where a “landowner is particularly resistant” and that it is “common practice for the Ministry to work around properties wherein Ministry employees and/or contractors do not believe that they can get a consensual agreement from a private landowner.”<sup>29</sup>

[32] In terms of the Third Parties’ property, the Manager says that the Ministry and the Third Parties’ reached a “consensual agreement” for the transfer of their property to the Province for the purposes of the Project for an agreed upon

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<sup>22</sup> *Langley (Township) v. Witschel*, 2015 BCSC 123 at para. 35, citing and applying *Belanger v. Gilbert*, 1984 CanLII 355 (BCCA).

<sup>23</sup> Order F20-21, 2020 BCIPC 25 (CanLII) at paras. 65-67. *Maillet v. Thomas Corner Mini Mart & Deli Inc.*, 2017 BCSC 214 at para. 13.

<sup>24</sup> *Maillet v. Thomas Corner Mini Mart & Deli Inc.*, 2017 BCSC 214 at paras. 12-14.

<sup>25</sup> Ministry’s submission dated November 9, 2021 at para. 89.

<sup>26</sup> *Ibid* at para. 90. Affidavit #1 of J.T. at paras. 11-13, 20.

<sup>27</sup> Affidavit #1 of J.T. at paras. 5-18.

<sup>28</sup> *Ibid* at para. 9.

<sup>29</sup> *Ibid* at para. 6.

amount.<sup>30</sup> The Manager attests that another Ministry employee (now retired) told her that the “property acquisition negotiations” with the Third Parties “proceeded along the normal Ministry acquisition process and in accordance with Ministry policies.”<sup>31</sup>

[33] The Manager also confirms that the Ministry used an agent in its negotiations with the Third Parties as per its usual practice. The Manager says she spoke with that agent who told her that he found the negotiations with the Third Parties “to be a challenging one.”<sup>32</sup> The Manager adds that the agent informed her that he recalled having discussions with the Third Parties “about options if a consensual agreement could not have been reached.”<sup>33</sup>

[34] The Third Parties describe their negotiations with the Ministry as fair and amicable. They say at no time during the negotiations did they refuse to sell their property to the Ministry for the purpose of the Project.<sup>34</sup> The Third Parties state that “settlement was likely” because they understood and had confidence from the outset that those negotiations would not be disclosed pursuant to settlement privilege.<sup>35</sup>

[35] The applicant questions what was challenging about the Ministry’s negotiations with the Third Parties. He suspects and speculates that those challenges were about satisfying the Third Parties’ demands, specifically their preferences as to the proposed placement of his driveway.<sup>36</sup> The applicant further questions why the property agent did not give affidavit evidence about those challenges.

[36] The applicant also highlights an inconsistency in the Ministry’s argument. He notes that the Ministry would like us to believe that its negotiations with the Third Parties were standard and straightforward, but he says the Ministry then claims that those negotiations were challenging.

[37] In response, the Third Parties dispute any claim that its negotiations with the Ministry were challenging. They say there were certain construction issues that they requested, which took time, but that “agreement was reached on all issues.”<sup>37</sup> The Third Parties also emphasize that the applicant’s driveway was not part of their negotiations with the Ministry.

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<sup>30</sup> Affidavit #1 of J.T. at para. 19.

<sup>31</sup> *Ibid* at para. 7.

<sup>32</sup> *Ibid* at para. 22.

<sup>33</sup> *Ibid* at para. 23.

<sup>34</sup> Third Parties’ submission dated November 8, 2021 at para. 5.

<sup>35</sup> *Ibid*.

<sup>36</sup> Applicant’s submission at p. 12.

<sup>37</sup> Third Parties’ submission dated December 13, 2021 at p. 1.

[38] The Ministry accuses the applicant of “unnecessarily and unfairly” focusing on its use of the word “challenging” to describe its negotiations with the Third Parties.<sup>38</sup> It clarifies that its agent found the negotiations “‘challenging’ or complex as there were multiple items to consider and discuss related to compensation and construction in order to put together the final agreement.”<sup>39</sup>

*Analysis and findings on litigious dispute*

[39] I am satisfied the Ministry negotiated with the Third Parties to purchase a portion of their property and that the Agreement is the product of those successful negotiations. However, there needs to be evidence of a dispute between the parties, otherwise those negotiations would not be for settlement purposes or qualify as settlement negotiations. For the reasons to follow, I find those negotiations did not relate to a pending dispute or a dispute to be settled between the parties.

[40] To start, I am not persuaded that the Ministry’s process to acquire private property for its transportation projects always means there is a dispute. The Manager emphasizes that a consensual agreement is the priority and that expropriation is used as a last resort and only carried out in rare circumstances.<sup>40</sup> Furthermore, if a property owner is not cooperative about selling their property, then there are other options available to the Ministry. The Manager says it is common practice for the Ministry to work around properties when a landowner is particularly resistant and where it is possible to design around that property “instead of continuing to pursue acquisition of the private property.”<sup>41</sup> Therefore, I find the Ministry’s property acquisition process does not automatically trigger expropriation action or that expropriation is the inevitable result.

[41] I acknowledge that the Ministry’s land acquisition process can lead to a dispute between the parties, particularly where the private landowner refuses to sell the sought-after property to the Ministry or there is a disagreement over the purchase price. However, there is no evidence there was any kind of dispute between the parties in this case. The Third Parties are clear that at no time did they refuse to sell a portion of their property to the Ministry and that agreement was reached on all issues.<sup>42</sup> I find the Third Parties’ evidence persuasive since they have direct knowledge of the events and the negotiations. Accordingly, I conclude the negotiation between the parties was not related to any dispute over the Ministry’s purchase of the Third Parties’ property for the Project.

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<sup>38</sup> Ministry’s submission dated December 15, 2021 at para. 18.

<sup>39</sup> *Ibid.*

<sup>40</sup> Affidavit #1 of J.T. at para. 9.

<sup>41</sup> Affidavit #2 of J.T. at para. 7.

<sup>42</sup> Third Parties’ submissions dated November 8, 2021 on p. 2 at point 5 and December 13, 2021 at p. 1.

[42] The Ministry does not contest the Third Parties' evidence, but characterizes those negotiations as challenging or complex.<sup>43</sup> It is clear that land purchase contracts can be complicated and multi-faceted, but that level of complexity does not automatically equate to a dispute for the purposes of settlement privilege as argued by the Ministry. It is also clear that calling something a "dispute" or a "settlement", as the parties do in their submissions, does not make it so. What matters instead is the circumstances and details of each case.

[43] The evidence in this case indicates that the Ministry and the Third Parties successfully entered into a contract for the sale and purchase of property. In other words, they negotiated and reached agreement on the terms of a contract rather than negotiated the terms of a settlement to resolve a dispute. Prior jurisprudence has made it clear that, without more, this type of negotiation does not satisfy the first requirement of settlement privilege.<sup>44</sup> In particular, this is not a situation where the Third Parties were forced to negotiate with the Ministry, rather they did so willingly, or that expropriation was an inevitable conclusion.

[44] I have also taken into account the Ministry's submission that court proceedings would likely have commenced if the parties were unable to reach an agreement over the purchase of the Third Parties' property. I infer the Ministry to be arguing that the facts also satisfy the litigious dispute requirement because there was the possibility of litigation. However, I am not satisfied that just the power or potential to litigate is enough to satisfy the litigious dispute requirement. The first of the three criteria for establishing settlement privilege requires that the litigious dispute be in existence or within contemplation in the sense that litigation is more than a mere possibility and only where the dispute has become litigious does the privilege arise.<sup>45</sup>

[45] In the present case, the Third Parties emphasize that they "negotiated amicably and fairly with all parties in order to reach an agreement" and at no time did they refuse to sell their land to the Ministry for the Project.<sup>46</sup> Therefore, although the possibility existed that a litigious dispute may arise, I find there was no dispute, much less a litigious dispute, in existence or within contemplation of the parties, since there is insufficient evidence that the parties were in a disagreement or that the Third Parties were fighting the Ministry on the purchase of their property. As a result, for all the reasons given, I find one of the three necessary conditions to establish settlement privilege is not satisfied.

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<sup>43</sup> Affidavit #1 of J.T. at para. 22.

<sup>44</sup> Order F20-21, 2020 BCIPC 25 (CanLII) at paras. 65-67. *Maillet v. Thomas Corner Mini Mart & Deli Inc.*, 2017 BCSC 214 at para. 13.

<sup>45</sup> *Ross River Dena Counsel v. Canada (Attorney General)*, 2009 YKSC 4 (CanLII) at paras. 41 and 42 (aff'd 2009 YKCA 8), citing *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd.*, 2007 BCSC 143 at para. 103.

<sup>46</sup> Third Parties' submission dated November 8, 2021 on p. 2 at point 5.

[46] Given my finding, it is not necessary for me to consider the other requirements in the analysis since each requirement must be satisfied. However, I find that the lack of a dispute between the parties means that the third requirement is not satisfied as well. The third requirement to establish settlement privilege requires that the purpose of the communication or document must be an attempt to effect a settlement of *the dispute* between the parties. Since there is no evidence of a dispute between the parties, then there would be nothing to resolve or attempt to settle. As a result, the third requirement to establish settlement privilege is also not met in this case.

[47] To conclude, for the reasons given, I find the Ministry has not proven that settlement privilege applies to the Agreement. I will next consider whether s. 22(1) applies to the information withheld in the Agreement, along with the other information at issue.

### ***Section 22 – unreasonable invasion of third-party personal privacy***

[48] 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. Numerous OIPC orders have considered the application of s. 22(1) and I will apply the same approach in this inquiry.

[49] The records in dispute under s. 22 consist of the following:

- The Agreement.
- An email chain between the Ministry's property negotiation agent (Agent) and its property acquisition coordinator (Coordinator), which details a telephone conversation between one of the Third Parties and the Agent about the Project.<sup>47</sup>
- Notes summarizing the aforementioned telephone conversation.<sup>48</sup>
- Two email chains between the Coordinator and the Agent that include earlier emails between Ministry employees and contractors about managing access for various properties impacted by the Project.<sup>49</sup>
- An email between the Coordinator and the Agent that includes information about the Third Parties and the discussion of a retaining wall for the applicant's property.<sup>50</sup>

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<sup>47</sup> Page 22 of the records.

<sup>48</sup> Page 23 of the records.

<sup>49</sup> Pages 24 and 25 of the records.

<sup>50</sup> Page 26 of the records.

## Personal information

[50] 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.<sup>51</sup>

[51] Personal information” is defined in FIPPA as “recorded information about an identifiable individual other than contact information.”<sup>52</sup> 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.

[52] 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.”<sup>53</sup>

[53] The Ministry submits that the information at issue is personal information since it consists of the names of individuals, “geographical locators”, personal email addresses, the details of conversations between Ministry employees and other individuals, an individual’s opinion of others and details of property acquisition negotiations between the Ministry and several property owners.<sup>54</sup>

[54] The Third Parties submit that their Agreement with the Ministry is their personal information.

[55] I will consider all of this information below based on the following headings:

- The Agreement;
- Names and related information;
- Details of conversations with third parties; and
- Personal email addresses.

### *The Agreement*

[56] The Third Parties describe the Agreement as containing information about their personal and private negotiations with the Ministry. They contend that it reveals what they were willing to accept in exchange for the portion of their property sought by the Ministry for the Project.

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<sup>51</sup> Order 03-41, 2003 CanLII 49220 (BCIPC) at paras. 9–11.

<sup>52</sup> Schedule 1 of FIPPA.

<sup>53</sup> Schedule 1 of FIPPA.

<sup>54</sup> Ministry’s submission dated November 9, 2021 at para. 47.

[57] I find the Agreement contains information about the Third Parties, their property and the details of their contract with the Ministry. None of this information is for work contact purposes in accordance with the definition of contact information. While some of the information appears to be standard contractual language, I find all of the withheld information is about the Third Parties, specifically the terms and conditions under which they agreed to sell their property to the Ministry. Therefore, I conclude the entire Agreement qualifies as the Third Parties' personal information.

*Names and related information*

[58] I am satisfied some of the information withheld by the Ministry is about several identifiable individuals and does not qualify as contact information. The Ministry says the information at issue includes the names of property owners and geographical locators. I can see that this information appears in several emails related to the Project and consists of several third parties' surnames and what appear to be two location coordinates related to the Project.<sup>55</sup> The Ministry withheld the person's surname and disclosed the rest of the information in these records. I find the disclosed information shows what the Ministry was working on in relation to that individual's property. Therefore, I conclude that these surnames on their own, or in combination with the geographical locators, are about identifiable individuals and would reveal the identity of individuals who own property impacted by the Project.

[59] I can also see that the Ministry withheld the full names of two individuals and a description of their activities in an email<sup>56</sup> and the first name of an individual in another email related to the Third Parties.<sup>57</sup> Although these individuals are Ministry employees or contractors, I am satisfied that their names are not provided for work contact purposes and instead describe the person's actions or statements related to the Project. As a result, I find this information qualifies as the personal information of those individuals and is not contact information.

[60] However, there is a small amount of information that is not about an identifiable individual, but consists of the names of two businesses where this information is not linked to a particular individual.<sup>58</sup> Previous OIPC orders have held that this type of information does not qualify as personal information under s. 22.<sup>59</sup> In the present case, it is not apparent from the record itself and the Ministry does not explain how the names of these businesses are about any identifiable individual. I, therefore, find this information does not qualify as

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<sup>55</sup> Information located on pp. 24 and 25 of the records.

<sup>56</sup> Page 25 of the records.

<sup>57</sup> Page 26 of the records.

<sup>58</sup> Information located on p. 25 of the records.

<sup>59</sup> Order F17-39, 2017 BCIPC 43 (CanLII) at para. 75.

personal information and the Ministry cannot withhold this information under s. 22(1).

*Details of conversations with third parties*

[61] I find some of the information at issue reveals the Agent's description of conversations he had with one of the Third Parties and with a Ministry employee.<sup>60</sup> The Ministry submits that this information consists of a person's opinion about other individuals. I can see that this information recounts what one of the Third Parties and what the Ministry employee said about some matters and the Agent's response and comments about what was discussed. I am satisfied that all of this information is about identifiable individuals and their actions or statements.

*Personal email addresses*

[62] The Ministry says the information at issue also includes two personal email addresses.<sup>61</sup> One of the email addresses belongs to the Agent and the other email address is associated with a Ministry employee. The Ministry argues that this information is not contact information because "it is not clear that those email addresses were intended to be used exclusively, or at all, for business purposes."<sup>62</sup>

[63] With regards to the Ministry employee, it says that it is entirely possible that this individual's personal email address was used in error. It adds that these individuals, one of whom is deceased, would not expect their personal email address to be disclosed more than ten years later in response to a FIPPA access request. It submits, therefore, that these emails should be withheld out of an abundance of caution.

[64] Relying on previous OIPC orders, the Ministry also argues that these email addresses should be withheld because there is a "lack of clarity" about "whether these personal email addresses were provided/received in confidence."<sup>63</sup> It also contends that there is no evidence suggesting that the email addresses were being used to enable an individual at a place of business to be contacted.<sup>64</sup>

[65] Whether information will qualify as contact information under s. 22 depends on the context in which the information appears in the records. A personal email address is not normally "information to enable an individual at

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<sup>60</sup> Pages 22, 23 and 26 of the records.

<sup>61</sup> Information located on pp. 22, 24, 25 and 26 of the records.

<sup>62</sup> Ministry's submission dated November 9, 2021 at para. 51.

<sup>63</sup> *Ibid* at para. 53, citing Order F16-52, 2016 BCIPC 58 (CanLII).

<sup>64</sup> *Ibid* at para. 52, citing Order F15-59, 2015 BCIPC 62 (CanLII).

a place of business to be contacted.” However, this information may qualify as “contact information” under FIPPA if the person is using their personal email address to conduct business or to allow someone to contact them for business purposes.<sup>65</sup>

[66] I will first address whether the Agent’s email address qualifies as contact information. I can see from the context in which this information appears in the records at issue that the Agent is using the email address for business purposes. It is clear that the Agent uses the email address to communicate with the Ministry employee about the Project and to conduct business related to the Project. As a result, I am satisfied that the Agent’s email address qualifies as contact information so it is not personal information. Accordingly, the Ministry is not authorized to withhold the Agent’s email address under s. 22(1).

[67] I have considered the previous OIPC orders cited by the Ministry and do not find them persuasive in my determination of the information at issue in this inquiry. Each of those previous orders was determined on their own facts. In the present case, I find the records clearly establish that the Agent’s email address is contact information.

[68] Turning now to consider the Ministry employee’s email address, the Ministry submits that the Agent forwarded an email to the employee’s personal email address in error. In support of its position, the Ministry provided an affidavit from one of its deputy directors who attests that he believes the Agent accidentally forwarded the email to the employee’s personal address rather than the employee’s work email address.<sup>66</sup>

[69] Although the deputy director does not identify the source or basis of his beliefs, I accept that the Ministry employee’s personal email address may have been used in error. I note that the employee’s work email address is used to communicate about the Project in all the other emails at issue. There is no evidence that the employee used his personal email address to send emails about the Project and conduct business. The employee was the recipient of the forwarded email which supports the idea that he did not intend for his personal email address to be used for business contact purposes. For those reasons, I conclude the employee’s personal email address is his personal information and not contact information under s. 22.

#### **Section 22(4) – disclosure not an unreasonable invasion**

[70] 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

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<sup>65</sup> Order F21-35, 2021 BCIPC 43 (CanLII) at para. 164.

<sup>66</sup> Affidavit of S.S. at para. 15.

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

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

[72] 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. Under schedule 1 of FIPPA, the term "employee" includes a "service provider" which is defined as "a person retained under a contract to perform services for a public body."

[73] There are some individuals who are Ministry employees or contractors and would, therefore, either qualify as a public body "employee" during their employment with the Ministry or during their contract to perform services for the Ministry on the Project.<sup>67</sup> The question then is whether the information at issue is about the position or function of those individuals for the purposes of s. 22(4)(e).

[74] 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.<sup>68</sup> Section 22(4)(e) also applies to information that relates to a public body employee's job duties in the normal course of work-related activities, namely objective factual information about what the individual did or said in the course of discharging their job duties.<sup>69</sup>

[75] The personal information at issue includes the names of public body employees and a description of their activities related to the Project.<sup>70</sup> I find some of this information includes objective, factual information about what these public body employees did in the normal course of carrying out their work functions related to the Project. As a result, I find s. 22(4)(e) applies to this information and its disclosure is not an unreasonable invasion of a third party's personal privacy. Therefore, the Ministry cannot withhold this information under s. 22(1).

[76] On the other hand, I find that s. 22(4)(e) does not apply to a public body employee's comments and opinions about matters related to the Third Parties

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<sup>67</sup> Information located on pp. 25 and 26 of the records. Definition of "employee" and "service provider" in Schedule 1 of FIPPA.

<sup>68</sup> 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.

<sup>69</sup> Order 01-53, 2001 CanLII 21607 at para. 40. Order F18-38, 2018 BCIPC 41 (CanLII) at para. 70.

<sup>70</sup> Information located on pp. 25 and 26 of the records.

and their property.<sup>71</sup> I conclude this information is not objective, factual information, but consists of subjective information about the Third Parties and matters related to their property. As a result, I do not find s. 22(4)(e) applies to this information.

[77] I have considered the other types of information and circumstances listed under s. 22(4) and find no other provision applies.

### **Section 22(3) – presumptions in favour of withholding**

[78] 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.

[79] The Ministry submits that disclosing the information at issue is presumed to be an unreasonable invasion of a third party's personal privacy because s. 22(3)(f) applies. The applicant and the Third Parties made no submissions about s. 22(3). I have considered the other presumptions under s. 22(3) and conclude s. 22(3)(f) is the only presumption to consider in this case.

#### *Section 22(3)(f) – third-party's financial history, activities or assets*

[80] Section 22(3)(f) states that a disclosure of personal information is presumed to be an unreasonable invasion of a third-party's personal privacy if the personal information describes a third-party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.

[81] The Ministry submits that s. 22(3)(f) applies to information in the records that would disclose several third parties' financial assets and liabilities.<sup>72</sup> It says disclosure of this information would reveal the names of third parties who own property and who negotiated with the Ministry about that property in terms of "acquisition" or "access" through "licenses, leases or statutory rights-of-way."<sup>73</sup> Relying on past orders, the Ministry adds that the OIPC has taken a broad view of what constitutes financial information.<sup>74</sup> As a result, it submits the presumption under s. 22(3)(f) applies to the withheld information since it is related to the third parties' financial assets or liabilities.<sup>75</sup>

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<sup>71</sup> Information located on pp. 22, 23 and 26 of the records.

<sup>72</sup> Ministry's submission dated November 9, 2021 at para. 58.

<sup>73</sup> *Ibid* at para. 61.

<sup>74</sup> *Ibid* at paras. 59 and 60, citing Order F19-48, 2019 BCIPC 54 (CanLII).

<sup>75</sup> *Ibid* at para. 61.

[82] I find some of the information in the Agreement describes the Third Parties' financial history or activities. The Agreement contains the terms and payment under which the Third Parties and the Ministry agreed to sell and purchase the Third Parties' property. Therefore, I conclude the presumption under s. 22(3)(f) applies to this information. My finding is consistent with Order F16-17 where Adjudicator Francis found that s. 22(3)(f) applies to information about a third party's "agreement to various terms and payments made to them" as a result of a real estate transaction.<sup>76</sup> She concluded this information describes a third party's finances, financial history and activities.

[83] However, I find s. 22(3)(f) does not apply to the rest of the information at issue. The presumption in s. 22(3)(f) applies to information that is "financial in nature."<sup>77</sup> For instance, when it comes to assets, previous OIPC orders have found that s. 22(3)(f) applies when the information at issue describes the financial value of an asset.<sup>78</sup> I can see that the Ministry withheld the names of individuals who own property impacted by the Project. While property may be considered a person's asset, the information at issue is not about the financial nature or value of the property as an asset. This information is also not at all like the information that was at issue in the OIPC orders that the Ministry cites in support of its position. In those previous orders, the information was clearly financial in nature and described a third party's debt or monetary liability, and that is not the case here.

### **Section 22(2) – relevant circumstances**

[84] 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.

[85] The parties' submissions indicate that ss. 22(2)(a), (e) and (f) are relevant circumstances. The applicant's submission also raises as a consideration whether the personal information at issue is relevant to the applicant's stated purpose for his access request.

[86] I will consider all these circumstances in my s. 22(2) analysis. I have also 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 there are no other relevant circumstances for consideration.

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<sup>76</sup> Order F16-17, 2016 BCIPC 19 (CanLII) at para. 50

<sup>77</sup> Order F18-04, 2018 BCIPC 4 (CanLII) at para. 126.

<sup>78</sup> Order F16-38, 2016 BCIPC 42 (CanLII) at para. 122 and Order F09-14, 2009 CanLII 58552 (BCIPC) at para. 19.

*Public scrutiny – s. 22(2)(a)*

[87] Section 22(2)(a) requires a public body to consider whether disclosing the personal information is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny. Where disclosure would foster accountability of a public body, this may be a relevant circumstance that weighs in favour of disclosing the personal information at issue.<sup>79</sup>

[88] The applicant says two government employees informed him that the Third Parties did not want his access directly across from their driveway and that this was a sticking point in their negotiations with the Ministry for the sale of their property.<sup>80</sup> Therefore, the applicant suspects there was a “quid-pro-quo agreement” and the Ministry secretly agreed, as part of its purchase contract with the Third Parties, to ensure that the location of his driveway was not directly across from their driveway.<sup>81</sup>

[89] As a result, the applicant says that he made his access request to uncover any wrongdoing by the Ministry and the Third Parties, specifically unethical or criminal negotiations to secure a deal with the Third Parties at the cost of safe access for his property. The applicant says BC taxpayers have a right to any information about how the Ministry and the Third Parties reached their agreement in order to hold government and its employees accountable, especially if there were unethical or criminal negotiations.<sup>82</sup>

[90] The Ministry denies any allegations of wrongdoing. The Ministry submits that the applicant’s allegations that it made some sort of “quid pro quo” arrangement with the Third Parties is “pure speculation and not based on fact.”<sup>83</sup> The Ministry submits that s. 22(2)(a) is not a factor that weighs in favour of disclosure since it says the information at issue would not reveal anything meaningful about its activities. It says the information “would, at most, subject third party property owners to public scrutiny about their finances.”<sup>84</sup>

[91] The Third Parties say there was no “quid pro quo” with the Ministry and at no time did they make a deal to sell their property to the Ministry in exchange for a certain benefit to them.<sup>85</sup> They submit that the Agreement does not specify the location of the applicant’s driveway as a condition and at no time during their

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<sup>79</sup> Order F05-18, 2005 CanLII 24734 at para. 49.

<sup>80</sup> Applicant’s submission dated November 29, 2021 on p. 2 at point 3 and on p. 3 at point 6.

<sup>81</sup> *Ibid* on p. 13.

<sup>82</sup> *Ibid* at p. 3, point 5.

<sup>83</sup> Ministry’s submission dated December 15, 2021 at para. 22.

<sup>84</sup> Ministry’s submission dated November 9, 2021 at para. 63.

<sup>85</sup> Third parties’ submission dated December 13, 2021 at p. 1.

negotiations with the Ministry did they request or were they granted the opportunity to provide input as to the location of the applicant's driveway.<sup>86</sup>

[92] I do not find disclosing the information at issue would be desirable for the purpose of subjecting the activities of a public body to scrutiny or to hold a public body accountable for its actions. Rather, it reveals information about individuals and reveals nothing meaningful about a public body's activities.

[93] I understand the applicant is interested in the information at issue to uncover any unethical or criminal behaviour, especially regarding the placement of his former driveway. However, the information at issue does not reveal any unethical or criminal behaviour by the Ministry nor does it show that the location of the applicant's driveway was a part of any secret side deal between the Third Parties and the Ministry, as alleged by the applicant. Therefore, for all these reasons, I do not find s. 22(2)(a) is a factor that weighs in favour of disclosure.

*Unfair exposure to financial or other harm – s. 22(2)(e)*

[94] Section 22(2)(e) requires a public body to consider whether disclosure of a third party's personal information will unfairly expose the third party to financial or other harm. Previous OIPC orders have held that "other harm" for the purposes of s. 22(2)(e) consists of "serious mental distress or anguish or harassment."<sup>87</sup> For s. 22(2)(e) to apply though, the mental harm must go "beyond embarrassment, upset or a negative reaction to someone's behaviour."<sup>88</sup>

Parties' submissions on s. 22(2)(e)

[95] The Ministry alleges the Third Parties will be exposed to undue mental distress if their personal information is released to the applicant. It says the applicant and the Third Parties "have a long-standing acrimonious relationship involving the calling of police and threats of litigation."<sup>89</sup> The Ministry contends that, under s. 22(2)(e), "it is the exposure to harm, not the likelihood of harm that matters."<sup>90</sup>

[96] The Ministry adds that the applicant has "a history of commencing litigation in relation to various aspects of the Project."<sup>91</sup> It notes that the applicant is involved in an "ongoing and active" lawsuit against the Province seeking damages for trespass, breach of contract, *de facto* expropriation and

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<sup>86</sup> Third parties' submission dated November 8, 2021 at para. 3.

<sup>87</sup> Order F15-29, 2015 BCIPC 32 at para. 32.

<sup>88</sup> Order 01-15, 2001 CanLII 21569 (BC IPC) at para. 49.

<sup>89</sup> Ministry's submission dated November 9, 2021 at para. 68.

<sup>90</sup> *Ibid* at para. 67, citing Order 01-37, 2001 CanLII 21591 at para. 42.

<sup>91</sup> Ministry's submission dated November 9, 2021 at para. 69.

compensation under the *Expropriation Act*.<sup>92</sup> The Ministry also notes that the applicant's submissions are full of implied threats of future litigation.<sup>93</sup>

[97] The Ministry also alleges the applicant has engaged in a "form of harassment" against Ministry employees and contractors by contacting these individuals to try "to gain information about the Project and Ministry procedures."<sup>94</sup> In support of its position, the Ministry provided a copy of an email chain between the applicant and the Ministry's former manager of property services. In these emails, the applicant requests a copy of the Ministry's "Property Acquisition Standards and Procedures Manual" and asks whether the former manager does any consulting regarding property acquisitions.<sup>95</sup> The Ministry says the former manager now has a consulting business, but that this person's email address is not posted on the company's website.

[98] The Third Parties did not address the Ministry's submissions about the mental harm that they may be exposed to if the information at issue was disclosed to the applicant. They did, however, confirm that their relationship with the applicant is contentious.<sup>96</sup> The Third Parties allege that they have "endured countless forms of harassment" from the applicant and his family.<sup>97</sup> The Third Parties also allege the applicant and his wife "thrive on causing problems and launching lawsuits against anyone they feel has done them wrong."<sup>98</sup> They say the applicant and his wife's "clear intent" is to "launch a lawsuit" against them and the Ministry.<sup>99</sup>

[99] The applicant denies engaging in any type of harassment. Rather, the applicant describes how he, his family and other individuals were targeted, harassed or verbally attacked by the Third Parties. The applicant also questions how his litigation with the Province is relevant to this inquiry. He emphasizes that his lawsuit against the Province does not have anything to do with the Third Parties, his access request or the placement of his driveway. The applicant says the Ministry is raising it to "intentionally [muddy] the water" and tie his lawsuit to his access request.<sup>100</sup>

[100] The applicant also contests the Ministry's allegations that he is improperly obtaining personal contact information and harassing Ministry employees and contractors. He accuses the Ministry and the Third Parties of trying to "paint an

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<sup>92</sup> Ministry's submission dated November 9, 2021 at paras. 69-70.

<sup>93</sup> Ministry's submission dated December 15, 2021 at para. 9.

<sup>94</sup> Ministry's submission dated November 9, 2021 at para. 71.

<sup>95</sup> Ministry's submission dated December 15, 2021 at para. 25 and affidavit #2 of J.T. at para. 11.

<sup>96</sup> Third Parties' submissions dated November 8, 2021 and December 13, 2021.

<sup>97</sup> Third Parties' submission dated November 8, 2021 on p. 3 at point 7.

<sup>98</sup> Third Parties' submission dated December 13, 2021 at p. 2.

<sup>99</sup> *Ibid.*

<sup>100</sup> Applicant's submission dated November 29, 2021 at p. 11.

unflattering picture” of him.<sup>101</sup> The applicant says he obtained any contact information through public sources, such as the Ministry’s website and its staff contact page, or it was forwarded by Ministry staff.

Analysis and findings on s. 22(2)(e)

[101] I can see that the Third Parties and the applicant have a contentious relationship and they accuse each other of various wrongdoings. However, the Third Parties do not address or discuss any mental harm to which they may be exposed if the information at issue was disclosed to the applicant. The Third Parties had the opportunity to express those concerns, but did not do so. As a result, I find the Third Parties’ submissions do not support the Ministry’s assertions about their exposure to harm under s. 22(2)(e). There is also nothing in the records themselves or the surrounding circumstances to suggest any of the identifiable individuals will be exposed unfairly to the type or level of harm that s. 22(2)(e) addresses.

[102] Furthermore, it is also not apparent how the disclosure of the specific information at issue would unfairly expose the Third Parties to the type or level of harm required under s. 22(2)(e). Previous OIPC orders have found that the s. 22(2)(e) presumption applied where the information is sensitive or intimate information and it is likely that the applicant will use the information to cause the exposure to harm.<sup>102</sup>

[103] In the present case, the information related to the Third Parties consists of the terms and conditions under which they agreed to sell their property to the Ministry and details of conversations that the Third Parties had with Ministry employees or contractors about their property and the Project. None of this information is sensitive or intimate information. Given the contentious relationship between them, the Third Parties might be upset if this information was disclosed to the applicant, but that is not sufficient to engage the presumption under s. 22(2)(e).

[104] As well, I am not persuaded by the Ministry allegations and suggestions that the applicant would use the information at issue to harass others by contacting them or suing them over the information in the records. First, I do not find there is anything controversial in the withheld information for the applicant to litigate over. In my opinion, none of the information at issue in this inquiry shows wrongdoing on the part of the Ministry or anyone else.

[105] Second, I do not find the fact that the applicant sued the Province about matters related to the Project is an indication that the applicant is a vexatious

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<sup>101</sup> Applicant’s submission dated November 29, 2021 at p. 11.

<sup>102</sup> Order F20-37, 2020 BCIPC 43 (CanLII) at para. 121. Order F21-19, 2021 BCIPC 24 (CanLII) at para. 37

litigant who will use any information obtained in his access request to sue others. The applicant has obtained records about the Project through previous access requests and there is no evidence that the applicant is in litigation about any of those matters.<sup>103</sup> Therefore, without more, I find the Ministry and the Third Parties' assertions about the applicant's litigious intentions are too speculative.

[106] Finally, I note that there is evidence that the applicant recently contacted a former Ministry manager seeking to retain this individual's services and obtain information about the Ministry's property acquisition process. However, I do not find anything in the email communication or its circumstances to suggest that this equates to harassment. There is no evidence that the applicant continued to contact the former manager or engaged in improper conduct after this individual declined to offer his services to the applicant or provide the requested information.

[107] To conclude, for all the reasons given, I am not satisfied that s. 22(2)(e) is a circumstance that favours withholding the information at issue.

*Supplied in confidence - 22(2)(f)*

[108] Section 22(2)(f) requires a public body to consider whether the personal information was supplied in confidence. In order for s. 22(2)(f) to apply, there must be evidence that an individual supplied the information and that they did so under an objectively reasonable expectation of confidentiality, at the time the information was provided.<sup>104</sup>

[109] I will discuss the parties' positions and consider whether the information at issue was supplied in confidence based on the following headings:

- The Agreement
- Information in emails and notes
- Personal email address

The Agreement

[110] Starting first with the Agreement, the Ministry says its property negotiation agent informed the Third Parties that their discussions, negotiations and offers to purchase would be conducted in confidence and kept confidential. The Ministry emphasizes that there is no circumstance or legislation that requires disclosure of the agreement reached between the negotiating parties to purchase the Third Parties' property or that requires a public accounting of those funds.<sup>105</sup>

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<sup>103</sup> Applicant's submission dated February 7, 2022.

<sup>104</sup> Order F11-05, 2011 BCIPC 5 (CanLII) at paras. 41, citing and adopting the analysis in Order 01-36, 2001 CanLII 21590 (BC IPC) at paras. 23-26 regarding s. 21(1)(b).

<sup>105</sup> Ministry's submission dated November 9, 2021 at para. 76.

[111] The Third Parties confirm that they were assured numerous times by Ministry representatives that all matters related to the Agreement would be confidential. They submit that they relied on promises of confidentiality from all parties involved in the Project and at no time were they told or expected their “personal business to be released to anyone or become public.”<sup>106</sup> The Third Parties caution that “all trust will be lost” and it will “impact future negotiations of this nature with other members of the public” should any of their “personal and private negotiations” with the Ministry become public.<sup>107</sup>

[112] The applicant says he is not interested in the Agreement or knowing how much the Third Parties received for their property, unless it shows that the placement or access to his driveway was a part of their negotiations and transaction.<sup>108</sup>

[113] Previous OIPC orders have held that s. 22(2)(f) does not apply to any information in a contract that is negotiated by the parties.<sup>109</sup> It is not apparent, and none of the parties identify, what information in the Agreement was supplied rather than a product of negotiations between the Ministry and the Third Parties. I also note that s. 22(2)(f) requires that the personal information be *supplied* to the public body and not created or generated by the public body.<sup>110</sup> I can see that some of the information, such as certain sections and an appendix to the Agreement, looks like it was created by the Ministry.<sup>111</sup> As a result, I find s. 22(2)(f) does not apply to any of this information.

[114] Although there is insufficient evidence and explanation for me to conclude s. 22(2)(f) applies to the Agreement, what the Ministry and the Third Parties say persuades me that there is another relevant circumstance to consider. In Order F10-44, Adjudicator Fedorak emphasized that parties cannot contract out of their rights and responsibilities under FIPPA by devising contract language “that would dictate whether the information would be withheld under FIPPA.”<sup>112</sup> However, he found a relevant consideration weighing against disclosure, though not determinative of the issue, was the fact that “the parties may agree to treat the information in confidence and only disclose where required by law.”<sup>113</sup>

[115] I make the same finding here as both the Ministry and the Third Parties reiterate that their negotiations and the resulting Agreement were conducted in

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<sup>106</sup> Third Parties’ submission dated November 8, 2021 on p. 2 at point 4.

<sup>107</sup> *Ibid.*

<sup>108</sup> Applicant’s submission dated November 29, 2021 at p. 1 and 3.

<sup>109</sup> Order 02-56, 2002 CanLII 42493 (BC IPC) at para. 90 and Order F10-44, 2010 CanLII 77329 (BC IPC) at para. 26.

<sup>110</sup> Order F18-38, 2018 BCIPC 41 (CanLII) at para. 88.

<sup>111</sup> For instance, information located on pp. 1 and 4 and pp. 12-20 of the records.

<sup>112</sup> Order F10-44, 2010 CanLII 77329 (BCIPC) at para. 26, citing Order 00-47, 2000 CanLII 14412 (BC IPC).

<sup>113</sup> *Ibid.*

confidence and intended to be kept confidential. As a result, while there can be no absolute guarantee or assurance of confidentiality under FIPPA,<sup>114</sup> I find this consideration weighs against disclosure.

Information in emails and a note

[116] The Ministry submits that s. 22(2)(f) applies to personal information in the records that “detail conversations or communications between third parties and Ministry employees, contractors or agents about aspects of property acquisition negotiations or settlement.”<sup>115</sup> The Ministry says the third parties “would not expect this highly personal and sensitive information to be released to the general public.”<sup>116</sup> I found that s. 22(4)(e) applies to some of this information and, therefore, will not consider that information here.<sup>117</sup>

[117] For the other information at issue, I can see that this information is located in emails between the Agent and the Coordinator and in a one-page note prepared by the Agent that summarizes a telephone conversation with one of the Third Parties. This information consists of the Agent conveying information, making comments and providing an opinion about matters related to the Third Parties and their property. The information also includes one of the Third Parties providing the Agent with information about issues affecting their property.

[118] For the reasons to follow, I am not satisfied that these individuals supplied any of the information at issue in confidence. Section 22(2)(f) requires that the information be *supplied* in confidence and not generated by a Ministry employee.<sup>118</sup> I can see that the Agent, who qualifies as a public body “employee” under FIPPA, clearly created or observed the information that he is providing such as his comments and opinions on some matters.<sup>119</sup>

[119] It is also not apparent from the evidence, the records or the surrounding circumstances how any of the information at issue would be considered highly personal or sensitive as argued by the Ministry. None of it reveals any personal and sensitive details about an individual and it does not seem confidential. Rather, the information only describes matters related to work the Ministry is doing or needs to do for the Third Parties and their property. I also think some of this withheld information would need to be communicated to other individuals outside the Ministry in order to complete those tasks, which is inconsistent with any assertion of confidentiality.<sup>120</sup>

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<sup>114</sup> Order 01-07, 2001 CanLII 21561 (BC IPC) at para. 25.

<sup>115</sup> Ministry’s submission dated November 9, 2021 at para. 75, citing that this information is located on pp. 22, 23, 25 and 26 of the records.

<sup>116</sup> Ministry’s submission dated November 9, 2021 at para. 75.

<sup>117</sup> Information located on p. 25 of the records.

<sup>118</sup> Order F18-38, 2018 BCIPC 41 (CanLII) at para. 88.

<sup>119</sup> Information located on pp. 22, 23 and 26 of the records.

<sup>120</sup> Information located on pp. 22, 23 and 26.

[120] Finally, I am not satisfied that the information provided by one of the Third Parties was supplied in confidence. The Third Parties did not discuss their expectations of confidentiality at the time this information was supplied to the Agent. There is also nothing in the emails or note that indicates the Third Parties supplied any of the information at issue in confidence.

[121] All I have is the Third Parties' assertion that anything to do with the Agreement was supplied in confidence, including their personal and private negotiations with the Ministry.<sup>121</sup> However, I do not find that assertion applicable to the specific information at issue here, especially since I can see that this information is not about property related to the Agreement or any of those negotiations. I draw this conclusion by comparing the information at issue to other information in the records about the same matters that do not appear to have any association with the Agreement.<sup>122</sup> Therefore, without sufficient explanation or evidence, I am not persuaded that any of the personal information in the emails and the Agent's note was supplied in confidence in accordance with s. 22(2)(f).

#### Personal email address

[122] I found previously that a Ministry employee's personal email address qualified as his personal information and not contact information.<sup>123</sup> The Agent uses the employee's personal email address to forward the employee a copy of an email. The Ministry submits s. 22(2)(f) is relevant because the employee provided his personal email address in confidence. Relying on Order F16-52, the Ministry argues that s. 22(2)(f) applies because this employee would not have anticipated that his personal email address would be disclosed to the public more than ten years later pursuant to an access to information request.<sup>124</sup>

[123] Based on the materials before me, I am not persuaded that this Ministry employee supplied his email address to the Agent in confidence. The Ministry does not provide evidence or explain the circumstances regarding that supply. Specifically, I find what the Ministry says is speculative and not actually evidence of the employee's expectations of confidentiality at the time he supplied his email address. There is also nothing in the surrounding circumstances or the records themselves as to the employee's expectations of confidentiality when he gave the Agent his personal email address.

[124] I also conclude that Order F16-52 does not stand for the proposition the Ministry says it does, namely that a public body employee's personal email address will always be supplied in confidence. In that order, the adjudicator

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<sup>121</sup> Third Parties' submission dated November 8, 2021 on p. 2 at point 4.

<sup>122</sup> For example, information located on p. 26 of the records.

<sup>123</sup> Information located on p. 22 of the records.

<sup>124</sup> Ministry's submission dated November 9, 2021 at para. 78.

emphasized that her findings were based on the circumstances of that case and her review of the materials before her.<sup>125</sup> Therefore, each inquiry is clearly determined on its own facts and evidence and based on the evidence and circumstances of this case, I am not satisfied that the employee supplied his personal email address in confidence to the Agent as required under s. 22(2)(f).

[125] To conclude, for the reasons given, I do not find any of the information at issue in the disputed records was supplied in confidence in accordance with s. 22(2)(f).

*Whether the personal information is relevant to the applicant's purpose*

[126] Whether the personal information is relevant to an access applicant's stated purpose for wanting the personal information at issue may be a circumstance that weighs in favour or against disclosure.<sup>126</sup>

[127] In the present case, the applicant submits that he is interested in understanding why the Ministry first agreed to relocate his driveway directly across from the Third Parties' driveway, but then later changed its mind and allegedly proposed and pushed what he describes as an "unsafe and unusable" location.<sup>127</sup> The applicant strongly believes that the Third Parties had input into the proposed placement of his driveway. Based on this belief, it is apparent that the applicant is searching for proof that the Third Parties' negotiations and any agreement that they reached with the Ministry included the location and placement of his driveway as one of their demands.

[128] With one exception, I note that the applicant has already received all of the information in the responsive records that mentions or refers to his driveway. The only exception is information in an email chain between the Agent and the Coordinator which details a telephone conversation that the Agent had with one of the Third Parties and a copy of the Agent's notes summarizing that conversation.<sup>128</sup> Some of this withheld information mentions the applicant's driveway. Given the applicant's stated interest in information about his driveway, I find this factor weighs in favour of disclosing that information to the applicant.

[129] The remaining information withheld in the responsive records relates to the Third Parties and other named individuals and there is no mention of the applicant's driveway. In my view, none of this information shows that the Third Parties had any input into the "placement, location, compensation or design"<sup>129</sup> of

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<sup>125</sup> Order F16-52, 2016 BCIPC 58 (CanLII) at paras. 79 and 82.

<sup>126</sup> Order F21-35, 2021 BCIPC 43 (CanLII) at paras. 216-217. Order F15-33, 2015 BCIPC 36 (CanLII) at paras. 32-33.

<sup>127</sup> Applicant's submission dated November 29, 2021 on p. 8 at point 7.

<sup>128</sup> Information located on pp. 22 and 23 of the records.

<sup>129</sup> Applicant's revised access request dated August 28, 2019.

the applicant's private access or that it was part of a deal between the Third Parties and the Ministry related to the Agreement. As a result, I do not find that this factor weighs in favour of disclosing that information.

### **Conclusion on s. 22(1)**

[130] To summarize, I find some of the information at issue consists of "contact information", specifically the email address of the Agent.<sup>130</sup> I also find there is nothing in the evidence, the records themselves or the surrounding circumstances that links the names of two businesses to a particular individual; therefore, this information is not about an identifiable individual.<sup>131</sup> As a result, the Ministry is not authorized to withhold all of this information under s. 22(1) since it does not qualify as "personal information" under FIPPA.

[131] For the information that does qualify as "personal information", I find s. 22(4)(e) applies to some information because it consists of the names of public body employees and only reveals what these employees said and did in the ordinary course of work-related activities related to the Project.<sup>132</sup> Under s. 22(4), the disclosure of this information is not an unreasonable invasion of third-party personal privacy and the Ministry may not withhold that information under s. 22(1).

[132] As for the rest of the withheld information, considering all the relevant circumstances, I find it would be an unreasonable invasion of a third party's personal privacy to disclose the Agreement since some of this information is subject to the presumption under s. 22(3)(f) and I did not find any circumstances to rebut this presumption. The applicant has also expressly said that he is not interested in the Agreement unless it shows that the placement or access to his driveway was a part of the parties' negotiations and transaction. The Agreement does not contain this information nor would its disclosure subject a public body's activities to scrutiny under s. 22(2)(a). I also find it relevant that the parties to the Agreement understood and intended for their contract to be kept confidential.

[133] I also find it would be an unreasonable invasion of a third party's personal privacy to disclose most of the remaining information at issue in the other records. I considered whether there were any factors that weigh in favour of disclosing this personal information to the applicant and could find none. Most of this information is about the Third Parties and other named individuals and would not shed any further light on the matters of interest to the applicant. I note that, with one exception, none of this information mentions the applicant's driveway. Therefore, taking into account all these circumstances, I find disclosing this

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<sup>130</sup> Information located on pp. 22, 24, 25 and 26 of the records.

<sup>131</sup> Information located on p. 25 of the records.

<sup>132</sup> Information located on pp. 25 and 26 of the records.

information would be an unreasonable invasion of a third party's personal privacy.

[134] However, I am satisfied that disclosing the information that does discuss the applicant's driveway would not be an unreasonable invasion of a third party's personal privacy.<sup>133</sup> This information about the applicant's driveway was not supplied in confidence in accordance with s. 22(2)(f) and there was also insufficient evidence that disclosing this information would unfairly expose any of the third parties to financial or other harm under s. 22(2)(e). Instead, I find disclosing this information would provide the applicant with a fuller understanding of when, and under what circumstances, his driveway was a topic of conversation between the Ministry and the Third Parties. For all those reasons, I conclude the Ministry may not withhold this information under s. 22(1).

## **CONCLUSION**

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

1. The Ministry is not authorized to refuse access to the Agreement on the basis of settlement privilege.
2. I require the Ministry to refuse access to the Agreement under s. 22(1).
3. Subject to item 4 below, I confirm in part the Ministry's decision to refuse access to the information withheld in the records under s. 22(1).
4. The Ministry is not required by s. 22(1) to withhold the information highlighted in a copy of the records that will accompany this order. The Ministry is required to give the applicant access to the highlighted information.
5. The Ministry must provide the OIPC registrar of inquiries with proof that it has complied with the terms of this order, along with a copy of the relevant records.

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<sup>133</sup> Information located on pp. 22 and 23 of the records.

[136] Under s. 59(1) of FIPPA, the Ministry is required to comply with this order by April 21, 2022.

March 8, 2022

**ORIGINAL SIGNED BY**

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Lisa Siew, Adjudicator

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