Order F23-51

MINISTRY OF TRANSPORTATION AND INFRASTRUCTURE

Elizabeth Vranjkovic
Adjudicator

June 28, 2023

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Summary: The applicant requested access to a variety of records containing his personal information. The Ministry of Transportation and Infrastructure (Ministry) refused access to some information in the responsive records under several exceptions to disclosure in the *Freedom of Information and Protection of Privacy Act*. The adjudicator found that the Ministry correctly applied ss. 14 (solicitor-client privilege), 16(1) (harm to intergovernmental relations or negotiations) and 22(1) (unreasonable invasion of a third party's personal privacy) to some of the information at issue. However, the adjudicator found the Ministry was not authorized to withhold other information in the records under ss. 13(1) (advice or recommendations), 14, 16(1) and 22(1). In some of these records, the Ministry applied both s. 14 and 16(1) to the same information. Given their finding that s. 14 does not apply to that information, the adjudicator ordered the Ministry to produce some of the s. 14 records so the adjudicator could decide if s. 16(1) applied.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [RSBC 1996] c. 165, ss. 13(1), 13(2), 14, 16(1), 16(1)(a)(iii), 16(1)(c), 22(1), 22(2), 22(3), 22(4), 44(1)(b) and 44(3).

INTRODUCTION

[1] The applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to a variety of records containing information about him.

[2] The Ministry of Transportation and Infrastructure (Ministry) disclosed most of the responsive records to the applicant, but refused to disclose some information under ss. 13(1) (advice or recommendations), 16(1) (harm to intergovernmental relations or negotiations), 17(1) (harm to financial or economic interests), 19(1) (harm to individual or public safety) and 22(1) (unreasonable invasion of a third party's personal privacy) of FIPPA.

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. The Ministry subsequently reconsidered its decision and released some of the information previously withheld under ss. 13(1) and 16(1).[1] It also added s. 14 (solicitor-client privilege) to some of the withheld information. Mediation by the OIPC did not resolve the issues in dispute and they proceeded to inquiry.

[4] Prior to the inquiry, the Ministry disclosed all the information previously withheld under ss. 17(1) and 19(1). Therefore, I conclude ss. 17(1) and 19(1) and the newly disclosed information are no longer at issue in this inquiry. What remains at issue is the information withheld under ss. 13(1), 14, 16(1), and 22(1).

PRELIMINARY MATTERS

Issues not set out in the notice of inquiry

[5] In his inquiry submissions, the applicant raises issues not set out in the notice of inquiry (notice) and the investigator's fact report (fact report). For example, the applicant says that the Ministry did not provide all of the records responsive to his request, contrary to its duty under s. 6(1) of FIPPA to respond to his request without delay, openly, accurately and completely.[2] The applicant also says that the Province interfered with his business and that the OIPC should determine whether the Ministry infringed his constitutional rights.[3]

[6] As described in the notice, the fact report sets out the issues for the inquiry. The notice also clearly states that parties may not add new issues into the inquiry without the OIPC's prior consent.[4] Previous OIPC orders have consistently said that parties may add new issues at the inquiry stage only if they request and receive permission to do so.[5] To allow otherwise would undermine the effectiveness of the mediation process which exists, in part, to assist the parties in identifying, defining and crystallizing the issues prior to the inquiry stage.[6]

[7] The notice and fact report do not identify any of the new issues raised by the applicant as inquiry issues. The applicant did not seek permission to add these new issues or point to any exceptional circumstances that would justify doing so at this late stage. Additionally, I am not satisfied that I have jurisdiction under FIPPA to make findings about some of the new issues raised by the

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[1] Whenever I refer to section numbers throughout this order, I am referring to sections of FIPPA.
[2] Applicant's response submission at para 37.
[3] Applicant's response submission at paras 36 and 50.
[4] Notice of Written Inquiry, August 4, 2022.
[5] For example, Order F19-41, 2019 BCIPC 46 at para 5.
[6] Order F15-15, 2015 BCIPC 16 at para 10; Order F08-02, 2008 CanLII 1647 (BC IPC) at paras 28-30.

applicant. For these reasons, I decline to add any of the new issues raised by the applicant to the inquiry.

Disclosure to the world

[8] The Ministry says that in assessing whether or not disclosure could reasonably be expected to result in harm under FIPPA, a public body is entitled to assume that disclosure under FIPPA is effectively disclosure to the world at large.[7]

[9] The applicant says that it is unreasonable for the Ministry to withhold records on the basis that disclosure could effectively be considered disclosure to the world at large.[8] The applicant explains that he was privy to all of the communications at issue and he has not "sought the court of public opinion" on other records in his possession.[9]

[10] It is a well-established principle that under FIPPA, disclosure of information to an applicant in response to an access request is in effect disclosure to the world.[10] The applicant has not provided me with a sufficient basis to depart from this principle. Therefore, I have approached my analysis on the basis that disclosure to the applicant is disclosure to the world at large.

ISSUES

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

1. Is the Ministry authorized to refuse to disclose the information in dispute under ss. 13(1), 14 and 16(1)?

2. Is the Ministry required to refuse to disclose the information in dispute under s. 22(1)?

[12] Under s. 57(1), the Ministry has the burden of proving that the applicant has no right to access the information in dispute under ss. 13(1), 14 and 16(1).

[13] Under, s. 57(2), the applicant has the burden of proving that disclosure of the information in dispute under s. 22(1) would not unreasonably invade a third party's personal privacy. However, the Ministry has the initial burden of proving the information at issue qualifies as personal information under s. 22(1).[11]

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[7] Public body's initial submission at para 20.
[8] Applicant's response submission at para 40.
[9] Applicant's response submission at para 41.
[10] Order F22-31, 2022 BCIPC 34 at para 80.
[11] Order 03-41, 2003 CanLII 49220 (BC IPC) at paras 9-11.

DISCUSSION

Background

[14] The applicant acted as a representative of an Indigenous community (the Nation) in its consultations with various public bodies on numerous matters, including the Coastal GasLink pipeline project (Coastal GasLink).[12]

[15] Many of the responsive records relate to an application to amend Coastal GasLink's environmental assessment certificate (the amendment application). During the amendment application process, the Environmental Assessment Office (Assessment Office) consulted with several Indigenous communities, including the Nation.[13]

Records and information at issue

[16] The responsive records comprise 238 pages, most of which have been disclosed to the applicant. The Ministry is withholding some email chains and attachments in their entirety, portions of some emails and two columns of a spreadsheet under a number of FIPPA exceptions.

[17] In some instances, the Ministry applied more than one FIPPA exception to the same information. In going through my analysis, if I found that one exception applied, I did not consider the other cited exceptions.

Solicitor-client privilege, s. 14

[18] Section 14 says that the head of a public body may refuse to disclose information that is subject to solicitor-client privilege. Section 14 includes legal advice privilege as well as litigation privilege. The Ministry is claiming legal advice privilege over several email chains and attachments.

Sufficiency of evidence to substantiate the s. 14 claim

[19] The Ministry did not provide me with any of the records it withheld under s. 14. Instead, in addition to its submission on s. 14, the Ministry provided affidavit evidence from a lawyer with the Legal Services Branch of the Ministry of Attorney General (LSB), a senior lawyer with the LSB, a Regional Executive Director at the Ministry, and a table of records.

[20] Section 44(1)(b) gives me, as the Commissioner's delegate, the power to order production of records to review them during the inquiry. However, given the importance of solicitor-client privilege, and in order to minimally infringe on that

[12] Applicant's response submission at paras 12-13 and 21.
[13] Public body's initial submission at paras 11 and 24.

privilege, I would only order production of records being withheld under s. 14 when it is absolutely necessary to decide the issues in dispute.[14]

[21] After reviewing the Ministry's submissions and evidence, I determined that I did not have enough information to decide if s. 14 applies to the disputed records. Given the importance of solicitor-client privilege, I offered the Ministry an opportunity to provide additional evidence in support of its privilege claim.[15]

[22] In response, the Ministry provided a letter; an affidavit from a Director at the Ministry, supplemental affidavits from the lawyer and the senior lawyer (together, the lawyers); and revised tables of records appended to each of the lawyers' supplemental affidavits. I also provided the applicant an opportunity, which he took, to respond to the Ministry's additional submission and evidence.[16]

[23] Considering the supplemental evidence provided by the Ministry, I am now satisfied that the Ministry's evidence provides a sufficient evidentiary basis on which to make my s. 14 decision.

Legal advice privilege

[24] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice, opinion or analysis.[17] The essential elements of the test for legal advice privilege are that there must be:

1. a communication between solicitor and client;
2. that entails the seeking of providing of legal advice; and
3. that is intended by the solicitor and client to be confidential.[18]

[25] It is not necessary that the communication specifically request or offer advice, as long as it can be placed in the continuum of communications in which the solicitor tenders advice.[19] The "continuum of communications" involves the

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[14] Order F19-14, 2019 BCIPC 16 (CanLII) at para 10; *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 17; *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 68.
[15] Letter from the OIPC to the Ministry and the applicant dated February 7, 2023.
[16] In his supplemental submission, the applicant says that he was not privy to "any of the communications that took place between the Adjudicator and the Ministry" prior to the Ministry's email response attaching its supplemental submissions. To be clear, the applicant and his legal counsel were copied on the OIPC's February 7, 2023 letter to the Ministry offering an opportunity to provide additional evidence.
[17] *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at paras 26-31 [*College of Physicians*].
[18] *Solosky v The Queen*, [1980] 1 SCR 821 at page 837.
[19] *Samson Indian Band v Canada*, [1995] 2 FC 762, (1995) 125 DLR (4th) 294 at para 8.

necessary exchange of information between a lawyer and their client for the purpose of obtaining and providing legal advice such as "history and background from a client" or communications to clarify or refine the issues or facts.[20]

[26] Legal advice privilege also applies to information that, if disclosed, would reveal or allow an accurate inference to be made about privileged information. For example, legal advice privilege extends to internal client communications that discuss legal advice and its implications.[21]

Who is the client?

[27] To determine whether the disputed records are communications between a solicitor and their client, I must first determine who qualifies as the client. The Ministry submits the "client" should not be defined restrictively, nor technically; rather the client is the person or entity who receives legal services from counsel.[22]

[28] As noted, the Ministry provided evidence from a lawyer and a senior lawyer. I can see from the tables of records attached to the lawyers' supplemental affidavits that the disputed records involve communications between representatives of a variety of public bodies, as well as individuals outside of government. For example, the Oil and Gas Commission (Commission), the Ministry of Indigenous Relations and Reconciliation (Ministry of Indigenous Relations) and the Ministry of Energy, Mines and Petroleum (Ministry of Energy) were involved in the communications at issue related to Coastal GasLink.

[29] The lawyer says in her first affidavit that:

- At the time relevant to this inquiry her client was the Ministry of Indigenous Relations;[23]
- The employees of "each Ministry" represent the client;[24] and
- At the time relevant to the inquiry, she provided legal advice to the Ministry of Indigenous Relations and the Ministry on matters regarding the implementation of the Coastal GasLink benefits agreement (the benefits agreement) with the Nation and related consultation with the Nation.[25]

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[20] *Camp Development Corporation v South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at para 40 [*Camp*].
[21] See for example Order F22-34, 2022 BCIPC 38 at para 41, Order F22-53, 2022 BCIPC 60 at para 13, and Order F23-07, 2023 BCIPC 8 at para 25.
[22] Public body's initial submission at para 85.
[23] Lawyer's affidavit #1 at para 7.
[24] Lawyer's affidavit #1 at para 8.
[25] Lawyer's affidavit #1 at para 6.

[30] The lawyer says in her second affidavit that at the time relevant to the inquiry, she provided legal advice to the Ministry of Indigenous Relations.[26]

[31] In both of her affidavits, the lawyer says that her client is also His Majesty the King in right of the Province of British Columbia as represented by the various ministries of government. [27]

[32] Although the lawyer says that she provided legal advice to the Ministry, neither she nor the Ministry say that the Ministry was her client. [28] Instead, I find that the lawyer was referring to the fact that, according to her, she provided legal advice to the Ministry of Indigenous Relations, which it shared with the Ministry due to its involvement in Coastal GasLink.[29]

[33] I am satisfied, based on the lawyer's evidence, that she provided legal advice to the Ministry of Indigenous Relations on matters regarding the implementation of the benefits agreement and related consultation with the Nation. As a result, I conclude that the Ministry of Indigenous Relations was the lawyer's client for the purposes of the communications at issue. I turn now to the senior lawyer.

[34] In her first affidavit, the senior lawyer says that:

- In 2019, she gave legal advice to the Assessment Office;[30]
- At the time relevant to the inquiry, her clients were the Assessment Office and the Commission;[31] and
- The employees of the Assessment Office and the Commission represent the client.[32]

[35] In her second affidavit, the senior lawyer says that:

- During the time relevant to the inquiry, she provided legal advice to the Assessment Office;[33] and

[26] Lawyer's affidavit #2 at para 9.
[27] Public body's initial submission at paras 82 and 84; lawyer's affidavit #1 at para 8; lawyer's affidavit #2 at para 17. Depending on the date, the Ministry's submissions and affidavit evidence refer to either Her Majesty the Queen or His Majesty the King. For ease of reference and consistency, I will refer only to His Majesty the King.
[28] Lawyer's affidavit #1 at para 6.
[29] Lawyer's affidavit #1 at para 7.
[30] Senior lawyer's affidavit #1 at para 6.
[31] Senior lawyer's affidavit #1 at para 7.
[32] Senior lawyer's affidavit #1 at para 9.
[33] Senior lawyer's affidavit #2 at para 9.

- The employees of the Assessment Office, the Commission, the Ministry of Indigenous Relations, and the Ministry of Energy represent the client.[34]

[36] In both of her affidavits, the senior lawyer says that her client is also His Majesty the King in right of the Province of British Columbia "as represented by the various ministries of government."[35]

[37] The senior lawyer did not explain the reason for the change in her evidence about the identity of her clients from her first affidavit to her second affidavit. While I have concerns about this, I am mindful that my task "is not to get to the bottom of the matter and some deference is owed to the lawyer claiming the privilege."[36]

[38] I have also considered the senior lawyer's evidence that she was working with certain named employees of the Assessment Office, Commission, Ministry of Energy and Ministry of Indigenous Relations regarding the Province's duty to consult in relation to various provincial authorizations associated with Coastal GasLink.[37]

[39] Past orders have accepted that multiple government entities are the client where the public body provides evidence that a lawyer advised a group of government ministries or entities who were working on a specific matter.[38] The BC Supreme Court has also affirmed that evidence from a lawyer stating that they gave legal advice in confidence about a matter to a group of government entities who were working on that matter can be sufficient to establish that multiple government entities are a single client for the purpose of an assertion of solicitor-client privilege.[39]

[40] I am satisfied, based on the senior lawyer's evidence, that the Assessment Office, the Commission, the Ministry of Energy and the Ministry of Indigenous Relations were working on consultation matters regarding Coastal GasLink's environmental assessment certificate amendment application, and that the senior lawyer provided legal advice to those government entities on those matters. As a result, I conclude that for the purposes of the communications at issue, the senior lawyer's clients were the Assessment Office, the Commission, the Ministry of Energy and the Ministry of Indigenous Relations.

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[34] Senior lawyer's affidavit #2 at para 17.
[35] Senior lawyer's affidavit #1 at para 9; senior lawyer's affidavit #2 at para 17.
[36] *British Columbia (Minister of Finance) v British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at para 86 [*Minister of Finance*].
[37] Senior lawyer's affidavit #2 at paras 14 and 16.
[38] Order F22-11, 2022 BCIPC 11 at paras 36-38; Order F20-18, 2020 BCIPC 20 at paras 35-43.
[39] *Minister of Finance*, *supra* note 36 at paras 133-135.

[41] For the reasons that follow, I am not persuaded that the lawyer or senior lawyer's client with respect to the records in dispute was his Majesty the King in right of the Province of British Columbia as represented by the various ministries of government.

[42] First, as stated by the BC Supreme Court, a global assertion of privilege across government as a whole cannot support a claim of solicitor-client privilege over individual documents.[40] The party asserting privilege must provide some evidence to establish the provincial government as a whole was the client in the specific communications at issue.[41] Here, the lawyers have simply asserted that their client was His Majesty the King as represented by the various ministries of government. They have not provided any evidence in support of that assertion. In my view, the lawyers' assertions alone do not support a claim of privilege across the various ministries of government with respect to the records in dispute.

[43] Second, I find that it is contradictory for the lawyers to specify that their clients are specific individual ministries while also saying that their clients are all the various ministries of government. The Ministry has not explained, and I do not see, how to reconcile these positions.

[44] Additionally, I find the lawyers' evidence to be persuasive where they specify that their clients at the time relevant to the inquiry were specific public bodies, and that they provided legal advice on specific topics to specific public bodies.[42] They do not provide similar evidence about government as a whole.

[45] For the reasons outlined above, I find that the lawyer's client with respect to the records at issue was the Ministry of Indigenous Relations. I find that the senior lawyer's clients with respect to the records at issue were the Assessment Office, the Commission, the Ministry of Indigenous Relations and the Ministry of Energy.

Analysis and findings, legal advice privilege

[46] Keeping in mind the identity of the lawyers' clients, I will now consider the specific records at issue. Those records consist of: (1) email chains involving the lawyer; (2) an email chain involving the senior lawyer; and (3) attachments to those emails.

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[40] *Ibid* at paras 133-134.
[41] *Ibid*.
[42] Lawyer's affidavit #1 at paras 7 and 9; lawyer's affidavit #2 at para 9; senior lawyer's affidavit #1 at paras 6 and 7; senior lawyer's affidavit #2 at para 9.

Email chains involving the lawyer

[47] The Ministry is withholding three email chains involving the lawyer.[43] The email chains begin with emails between a representative of the Nation and a Commission employee. Those emails are then forwarded to other Commission employees, Ministry of Indigenous Relations employees and Ministry employees. Only one email, which appears partway through all three of the email chains, includes the lawyer. It is from a Commission employee to a Ministry of Indigenous Relations employee and is copied to the lawyer and another Ministry of Indigenous Relations employee.

[48] None of the emails in the email chains involving the lawyer are communications exclusively between the lawyer and her client, the Ministry of Indigenous Relations. As a result, the email chains do not meet the first part of the test for legal advice privilege.

[49] Despite this, the law recognizes that, in some circumstances, legal advice privilege will apply to communications between clients or their lawyers and third parties.[44] Legal advice privilege will apply to third party communications if the third party serves as a channel of communication between client and solicitor or performs a function integral to the solicitor client relationship.[45]

[50] A third party serves as a channel of communication if it acts as an "agent of transmission," carrying information between the solicitor and client, or if its expertise is required to interpret information provided by the client so that the solicitor can understand it.[46]

[51] A third party's function is integral to the solicitor client relationship if, for example, the third party has the client's authorization to either: (a) direct the solicitor to act on the client's behalf; or (b) seek legal advice from the solicitor on the client's behalf.[47] Conversely, a third party's function is not integral to the solicitor client relationship if, for example: (a) the third party gathers information from outside sources and passes it on to the solicitor so that the solicitor might advise the client; or (b) the third party acts on legal instructions from the solicitor.[48]

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[43] Information located on pages 170-173, 222-225 and 235-238 of the records. For ease of reference, when I refer to page numbers throughout this order, I am referring to the page numbers used by the Ministry in numbering the records.
[44] *College of Physicians*, *supra* note 17 at paras 43-51; *General Accident Assurance Co v Chrusz*, 1999 CanLII 7320 (ON CA) [*Chrusz*].
[45] *Greater Vancouver Water District v Bilfinger Berger AG*, 2015 BCSC 532 at para 27 [*Bilfinger Berger*].
[46] *Ibid* at para 27, item b.
[47] *College of Physicians*, *supra* note 17 at para 48, quoting with approval from *Chrusz*, *supra* note 44 at para 121.
[48] *Ibid*; *Bilfinger*, *supra* note 45 at para 27, item (c).

[52] The Ministry has not claimed or provided any evidence that the Commission served as a channel of communication between the Ministry of Indigenous Relations and the lawyer, or was performing a function integral to the solicitor-client relationship. That is also not apparent based on my review of the evidence about the records. As a result, I am not persuaded that legal advice privilege applies to the email from the Commission employee to the Ministry of Indigenous Relations employee that was copied to the lawyer.

[53] I have also considered whether there is a basis for concluding that disclosing the email chains would disclose or allow an accurate inference to be made about privileged information. The lawyer says she believes the "Section 14 Information" would disclose or lead to an accurate inference with respect to the legal advice the Ministry sought and received from LSB.[49] However, the lawyer does not explain what factors led her to form this opinion, nor does she specify what information would disclose the legal advice sought and what information would lead to an accurate inference about the legal advice sought. Moreover, the lawyer's evidence on this point is about "Section 14 Information," which is not a defined term, and is not specific to the email chains in dispute.[50] I am not persuaded by the lawyer's opinion, unsupported by evidence. I am not satisfied that disclosing the email chains at issue would disclose or allow for an accurate inference to be made about privileged information.

[54] For the reasons provided above, I conclude that legal advice privilege does not apply to the email chains involving the lawyer.

Email chain involving the senior lawyer

[55] The Ministry is withholding one email chain involving the senior lawyer.[51] The first email in the chain is from an Assessment Office employee to the senior lawyer, a Ministry of Indigenous relations employee, two Ministry of Energy employees, and a Commission employee, and is copied to two Assessment Office employees. There are subsequently several reply emails amongst those employees that are also copied to a Government Communications & Public Engagement (Communications) employee. Following those emails, an Assessment Office employee replies to a Ministry of Indigenous Relations employee, who then forwards the email chain to a Ministry employee.

[56] The emails from employees of the Assessment Office, the Commission, the Ministry of Indigenous Relations and the Ministry of Energy to the senior

[49] Lawyer's affidavit #2 at para 21.
[50] Except for her evidence on this point, throughout the lawyers' affidavits, she refers to and uses the defined term "Section 14 Records" rather than "Section 14 Information."
[51] Information located on pages 210-214 of the records.

lawyer (client emails) clearly qualify as communications between solicitor and client. These emails meet the first part of the test for legal advice privilege.

[57] With respect to the second part of the test for legal advice privilege, the senior lawyer says that:

- In her opinion, all the communications which include her were within the continuum of communications in which she or her colleague at the LSB provided legal advice to the client;[52]
- Each communication which includes her related to the matters on which she was providing legal advice;[53] and
- Each communication which includes her related to the seeking, formulating or giving of legal advice.[54]

[58] I can also see from the table of records attached to the senior lawyer's supplemental affidavit that the subject matter of the email chain relates to the subject matter of the senior lawyer's legal advice. Considering all of this evidence, I am satisfied that the client emails are communications between the senior lawyer and her clients which entail the seeking or giving of legal advice or that fall within the continuum of those communications.

[59] As for the element of confidentiality, the applicant questions whether the communications were confidential given the number of parties involved.[55] The senior lawyer attests that she understood that the client representatives were providing her with information and seeking legal advice on a confidential basis and that the matters she was advising on were sensitive and required confidentiality and discretion.[56]

[60] I can see that other than the Communications employee, the parties to the client emails were all the senior lawyer's clients. I am satisfied from the context of the emails that the Communications employee was acting on behalf of the clients and that their role was integral to the solicitor-client relationship. As a result, I find that the client emails were intended to be confidential and that legal advice privilege applies to the client emails.

[61] The last two emails in the email chain are not to or from the senior lawyer. On their face, these emails are not communications between solicitor and client and are therefore not protected by legal advice privilege. However, I am not

[52] Senior lawyer's affidavit #2 at para 11.
[53] Senior lawyer's affidavit #2 at para 18.
[54] Senior lawyer's affidavit #2 at para 19.
[55] Applicant's response submission at paras 57 and 60.
[56] Senior lawyer's affidavit #1 at para 20; senior lawyer's affidavit #2 at para 20.

satisfied that these emails could be disclosed without any risk of privileged legal advice being revealed or ascertainable.[57] As stated by the BC Supreme Court:

> Disclosing one part of a string of communications gives rise to the real risk that privilege might be eroded by enabling the applicant for the communication to infer the contents of legal advice.[58]

[62] I can see from the table of records attached to the senior lawyer's supplemental affidavit that the last two emails relate to the same subject matter as the client emails. In my view, disclosing the other emails would allow for an accurate inference to be made about the contents of the client emails. As a result, I find that legal advice privilege also applies to the last two emails in the chain.

[63] I conclude that legal advice privilege applies to the entirety of the email chain involving the senior lawyer.

Waiver

[64] Solicitor-client privilege belongs to and can only be waived by the client.[59] Once privilege is established, the party seeking to displace it has the onus of showing it has been waived.[60]

[65] The disclosure of privileged information to individuals outside of the solicitor-client relationship may amount to a waiver of privilege.[61] Waiver of privilege is ordinarily established where it is shown that the privilege holder knows of the existence of the privilege and voluntarily shows an intention to waive that privilege.[62] Waiver may also occur in the absence of an intention to waive, where fairness and consistency so require.[63]

[66] The last email in the email chain involving the senior lawyer consists of a Ministry of Indigenous Relations employee forwarding the email chain to a Ministry employee. I found above that the Ministry is not a client of the senior lawyer. As a result, I must consider whether waiver applies.

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[57] *British Columbia (Attorney General) v Lee*, 2017 BCCA 219 at para 40.
[58] *Camp*, *supra* note 20 at para 46.
[59] *Canada (National Revenue) v Thompson*, 2016 SCC 21 at para 39; *Lavallee, Rackel & Heintz v Canada (Attorney General)*, 2002 SCC 61 at para 39.
[60] *Le Soleil Hotel & Suites Ltd. V Le Soleil Management Inc.*, 2007 BCSC 1420 at para 22; *Maximum Ventures Inc v De Graaf*, 2007 BCSC 1215 at para 40 [*Maximum Ventures*].
[61] *S&K Processors Ltd. v Campbell Ave Herring Producers Ltd.*, 1983 CanLII 407 (BCSC) at para 6.
[62] *Ibid*.
[63] *Ibid*.

[67] The Ministry says that there has been no intentional or unintentional waiver of privilege.[64] The applicant does not say anything about waiver.

[68] I have no evidence before me that the Ministry of Indigenous Relations employee intended to waive privilege when she forwarded the email chain to the Ministry employee. Further, there is nothing to suggest that the Ministry of Indigenous Relations employees was authorized to waive privilege on behalf of the senior lawyer's clients.

[69] Given the importance of solicitor-client privilege to the functioning of the legal system, evidence justifying a finding of waiver must be clear and unambiguous.[65] In my view, there is insufficient evidence to conclude that there has been a waiver in this circumstance. Therefore, I find that the Ministry of Indigenous Relations employee did not waive privilege when she forwarded the email chain to the Ministry employee

Attachments

[70] The Ministry is withholding five attachments under s. 14: three attachments to the email chain involving the senior lawyer and two attachments to the email chains involving the lawyer.[66]

[71] An attachment may be privileged on its own, independent of being attached to another privileged record. Alternatively, an attachment may be privileged if it is an integral part of the communication to which it is attached and it would reveal the communication protected by solicitor-client privilege either directly or by inference.[67]

[72] I will first consider the two attachments to the email chains involving the lawyer. For the reasons given previously, I am not persuaded that the three email chains involving the lawyer are privileged. Accordingly, I find the attachments to those emails are not an integral part of a privileged communication and would not reveal any such privileged communication either directly or by inference.

[73] I am also not satisfied that the attachments to the email chain involving the lawyer are independently privileged. The attachments are described in the table of records attached to the lawyer's supplemental affidavit as an arbitration decision and a letter to the Nation about the arbitration.[68] Neither of these attachments are communications between the lawyer and the representatives of

[64] Public body's initial submission at para 81; senior lawyer's affidavit #2 at para 23.
[65] *Maximum Ventures*, *supra* note 60 at para 40.
[66] Information located on pages 174, 175-185 and 215-234 of the records.
[67] Order F20-08, 2020 BCIPC 9 at para 27; Order F18-19, 2018 BCIPC 22 at paras 36-40.
[68] Lawyer's affidavit #2, Exhibit A.

her clients. As a result, it is clear that the attachments do not meet the first part of the test for legal advice privilege.

[74] I have also considered whether the attachments might otherwise allow for an accurate inference to be made about privileged information. The lawyer says that:

- The attachments provided necessary information for her to provide clients with the requested legal advice;[69]
- The attachments relate to the substance of the legal advice she provided to the Ministry of Indigenous Relations regarding the Coastal GasLink Benefits Agreement and ongoing engagement with the Nation;[70] and
- She believes that disclosing the "Section 14 Information" would disclose or allow for an accurate inference to be made about privileged information.[71]

[75] Based on my review of the table of records attached to the lawyer's second affidavit, I can see that the attachments were not provided to the lawyer by the client. The courts have made clear that information provided to a lawyer by a third party is not protected simply because it relates to legal advice. In *General Accident Assurance Co v Chrusz*, Doherty J.A. of the Ontario Court of Appeal rejected the notion that legal advice privilege protects "all communications or other material deemed useful by the lawyer to properly advise his client."[72] I adopt this finding here. It is not enough that the attachments, which were not provided to the lawyer by her client, informed and relate to the lawyer's legal advice.

[76] In my view, the lawyer's belief alone does not establish that disclosing what she terms the "Section 14 Information" would disclose or allow for an accurate inference to be made about privileged information. The lawyer has not explained how disclosing the attachments would disclose or allow for an accurate inference to be made about privileged information. In the absence of such an explanation, I do not see how a letter to the Nation or an arbitration decision about the Nation could be considered privileged. I am not persuaded by the lawyer's opinion, unsupported by evidence. As a result, I am not satisfied that disclosing the attachments at issue would disclose or allow for an accurate inference to be made about privileged information.

[77] For these reasons, I conclude that legal advice privilege does not apply to these two attachments.

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[69] Lawyer's affidavit #2 at para 8.
[70] Lawyer's affidavit #2 at para 16.
[71] Lawyer's affidavit #2 at para 21.
[72] *Chrusz*, *supra* note 44 at 358. Doherty J.A. was dissenting, but on another point. The majority explicitly adopted his reasoning on legal advice privilege.

[78] I will now consider the three attachments to the email chain involving the senior lawyer. As discussed previously, I find this email chain is privileged. Therefore, the attachments to the email chain are attached to privileged communications. Accordingly, I must determine whether the attachments are integral parts of the email chain such that they could reveal the privileged communications either directly or by inference.

[79] The senior lawyer says that:

- The attachments provided necessary information for her to provide clients with the requested legal advice; and
- Two of the attachments are incoming letters from Indigenous communities, which informed her legal review of the Ministry's response, the third attachment.[73]

[80] I can also see from the table of records attached to the senior lawyer's supplemental affidavit that the attachments relate to the same subject matter as the email chain to which they are attached. I am satisfied that disclosing the attachments would allow an accurate inference to be made about the privileged communications to which they are attached.

[81] I conclude that legal advice privilege applies to the attachments to the email chain involving the senior lawyer but does not apply to the attachments to the email chains involving the lawyer.

Summary, s. 14

[82] I find that s. 14 applies to the email chain involving the senior lawyer and the attachments to that email chain. However, I find that s. 14 does not apply to the email chains involving the lawyer or the attachments to those email chains.

Information withheld under ss. 14 and 16(1)

[83] The Ministry applied s. 16(1) to the information I found could not be withheld under s. 14. Since I found s. 14 does not apply to that information, I must determine whether s. 16(1) applies.

[84] As previously noted, the Ministry did not provide the records it withheld under s. 14. As the Commissioner's delegate, s. 44(1)(b) authorizes me to order the Ministry to produce the disputed records for my review. However, this production power should only be exercised where it is necessary to fairly decide the issues in the inquiry.

[73] Senior lawyer's affidavit #2 at paras 8-9 and 15.

[85] I am unable to determine whether s. 16(1) applies without reviewing the disputed records. Section 16(1) does not have the same significance as solicitor-client privilege and cannot be dealt with only on affidavit evidence. It requires detailed line-by-line analysis that I cannot conduct without reviewing the disputed records.

[86] I find it necessary in this case to order the Ministry to produce the information for my review so that I can fulfill my duty under FIPPA and make an independent and informed decision about whether s. 16(1) applies.

[87] Accordingly, I order the Ministry under s. 44(1)(b) to produce the records to which I have found s. 14 does not apply and that remain in dispute under s. 16(1) to the OIPC for the purpose of adjudicating s. 16(1).[74]

Advice or recommendations, s. 13(1)

[88] Section 13(1) authorizes a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister.

[89] The purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny.[75]

[90] Past OIPC orders and court decisions have established the following principles for the interpretation of s. 13(1):

- Section 13(1) applies not only to advice or recommendations, but also to information that would allow someone to accurately infer advice or recommendations.[76]
- The terms "advice" and "recommendations" are distinct, so they must have distinct meanings.[77]
- "Recommendations" relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised.[78]
- "Advice" has a broader meaning than "recommendations."[79] It includes setting out relevant considerations and options, and providing analysis and opinions, including expert opinions on matters of fact.[80] Advice can

[74] Pages 170-85, 222-225 and 235-238 of the records.
[75] *John Doe v Ontario (Finance)*, 2014 SCC 36 at paras 45-51 [*John Doe*].
[76] Order 02-38, 2002 CanLII 42472 (BC IPC) at para 135.
[77] *John Doe*, *supra* note 75 at para 24.
[78] *Ibid* at paras 23-24.
[79] *Ibid* at para 24.
[80] *Ibid* at paras 26-27 and 46-47; *College of Physicians*, *supra* note 17 at paras 103 and 113.

be an opinion about an existing set of circumstances and does not have to be a communication about future action.[81]

- "Advice" also 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."[82] This is because the compilation of factual information and weighing the significance of matters of fact is an integral component of an expert's advice and informs the decision-making process.

[91] The first step in the s. 13 analysis is to determine whether the information in dispute would reveal advice or recommendations developed by or for a public body or minister. If it would, then I must decide whether the information falls into any of the categories listed in s. 13(2) which a public body must not refuse to disclose under s. 13(1).

[92] Finally, s. 13(3) says s. 13(1) does not apply to information in a record that has been in existence for 10 or more years. In this case, the records are not that old, so I find s. 13(3) does not apply.

Would the disputed information reveal advice or recommendations?

[93] The information in dispute under s. 13(1) is in two emails and two columns of a spreadsheet.[83] The emails are part of an email chain between two Ministry employees and relate to communications with the applicant and the Nation. The spreadsheet is described as a draft tracking spreadsheet for gravel pit investigations for Coastal GasLink.[84] Having reviewed the spreadsheet, I can see that it contains information about communications with several Indigenous communities.

[94] The Ministry says the information at issue would disclose the contents of advice or recommendations prepared for the Ministry, either directly or by providing an accurate inference with respect to the advice or recommendations provided.[85] The applicant says s. 13 was improperly applied.[86]

[95] Based on my review of the emails and the spreadsheet, I find that some of the information in dispute would reveal advice or recommendations, in particular, the following information:

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[81] *College*, *supra* note 17 at para 103.
[82] *Provincial Health Services Authority v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para 94.
[83] Information located on pages 1-4, 195 and 197 of the records.
[84] Public body's initial submission at para 47.
[85] Public body's initial submission at paras 44 and 50.
[86] Applicant's response submission at para 51.

- Information in the spreadsheet that summarizes comments provided by Indigenous communities about Coastal GasLink.[87] Past decisions have held that feedback solicited by a public body is advice or recommendations developed for a public body within the meaning of s. 13(1).[88] In my view, some of the comments are this type of feedback and, therefore, qualify as advice or recommendations.
- A suggested course of action in an email from one Ministry employee to another.[89] I find that this is advice within the meaning of s. 13(1).

[96] However, I find that the following information would not reveal advice or recommendations:

- Information in an email that was openly disclosed on page 195 of the records.[90] I conclude that the Ministry cannot withhold this information under s. 13(1) because disclosure would not "reveal" any advice or recommendations for the purposes of s. 13(1). This is consistent with previous OIPC orders which found that information that has already been disclosed to an applicant cannot be withheld under s. 13(1).[91]
- A question asked by one Ministry employee to another in an email.[92] The Ministry has not explained, and I do not see, how disclosing the question would reveal any advice or recommendations developed by or for the Ministry.
- Factual information in the spreadsheet, such as the dates and methods of communications with Indigenous communities, and whether certain activities were completed or not.[93]

Do any of the exceptions in s. 13(2) apply?

[97] Next, I will consider if s. 13(2) applies to the information that I found above would reveal advice or recommendations.

[98] The following subsections are raised by the parties:

> (2) The head of a public body must not refuse to disclose under subsection (1)
>
> (a) any factual material,...

[87] Information located on pages 1-3 of the spreadsheet.
[88] *BC Freedom of Information and Privacy Association v British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 1162 at para 66; Order F14-17, 2014 BCIPC 20 at paras. 45–46
[89] Information located on pages 195 and 197 of the records.
[90] Information location on page 197 of the records.
[91] Order F20-32, 2020 BCIPC 38 at para 36; Order F13-24, 2013 BCIPC 31 at para 19; Order F12-15, 2012 BCIPC 21 at para 19.
[92] Information located on pages 195 and 197 of the records.
[93] Information located on pages 1-4 of the records.

> (f) an environmental impact statement or similar information,...
>
> (j) a report on the results of field research undertaken before a policy proposal is formulated,...
>
> (m) information that the head of the public body has cited public as the basis for making a decision or formulating a policy, or
>
> (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of an applicant.

[99] The Ministry says that none of the information withheld under s. 13(1) is factual information and no other subsections of s. 13(2) apply. [94]

[100] The applicant says that he is being prejudiced, contrary to s. 13(2), and that ss. 13(2)(a), (f), (j), (m), and (n) should be reviewed and considered.[95] The applicant only addresses s. 13(2)(n) in any detail. With respect to that section, the applicant alleges the Ministry may be improperly withholding information and that he relies on the Commissioner's review to ensure that none of the records are being withheld wrongfully contrary to s. 13(2)(n).[96]

[101] Having reviewed the disputed information, I am satisfied it does not contain a decision, let alone a decision that affects the applicant's rights. Instead, this information is a suggested course of action provided by one employee to another to consider and summaries of feedback provided by Indigenous communities in relation to Coastal GasLink. As a result, I find s. 13(2)(n) does not apply.

[102] The applicant has not explained how the other sections he raised apply, and it is not apparent to me based on my review of the information at issue how they might apply. With respect to s. 13(2)(a), none of the information that I have found would reveal advice or recommendations is factual. It is also clear to me that none of the information at issue is an environmental impact statement or similar information within the meaning of s. 13(2)(f), or a report on the results of field research undertaken before a policy proposal is formulated under s. 13(2)(j). Finally, I find s. 13(2)(n) does not apply because there is no evidence before me that any public body cited any of the information at issue as the basis for making a decision or formulating a policy.

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[94] Public body's initial submission at paras 57-58.
[95] Applicant's response submission at paras 32 and 50-51.
[96] Applicant's response submission at para 51. I assume that when the applicant refers to 13(N), he means s. 13(2)(n).

Summary, s. 13(1)

[103] In conclusion, I find some of the information withheld by the Ministry under s. 13(1) would reveal advice or recommendations developed by and for the Ministry. I also find that ss. 13(2) and 13(3) do not apply to that information. Therefore, I conclude the Ministry is authorized to withhold that information under s. 13(1). The Ministry is not authorized under s. 13(1) to withhold the information that I found would not reveal any advice or recommendations developed by or for the Ministry. I have highlighted the information that may not be withheld under s. 13(1) in a copy of the records that will be provided to the Ministry with this order.

Harm to intergovernmental relations, s. 16(1)

[104] Section 16(1) permits a public body to withhold information if disclosure could reasonably be expected to harm intergovernmental relations or negotiations.

[105] The standard of proof required by s. 16(1) is a reasonable expectation of probable harm, which is "a middle ground between that which is probable and that which is merely possible."[97]

[106] To meet this standard, the Ministry must prove that disclosure of the specific information at issue will result in a risk of harm that goes "well beyond the merely possible or speculative" but it does not need to prove on a balance of probabilities that disclosure will in fact result in such harm.[98] There needs to be a reasonable basis for believing the harm will result.[99]

[107] Furthermore, it is disclosure of the information in dispute which must give rise to the reasonable expectation of harm.[100] The Ministry 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."[101]

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[97] *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para 54 [*Community Safety*].
[98] *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at para 206 [*Merck Frosst*].
[99] *Community Safety*, *supra* note 97 at para 59; *British Columbia Hydro and Power Authority v British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 2128 at para 93.
[100] *British Columbia (Minister of Citizens' Services) v British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 at para 43.
[101] *Merck Frosst*, *supra* note 98 at para 219.

Parties' positions

[108] The Ministry says that ss. 16(1)(a)(iii) and 16(1)(c) apply to several email chains and information in two columns of the spreadsheet.[102]

[109] The applicant does not say anything about whether ss. 16(1)(a)(iii) and 16(1)(c) apply to the information at issue in the email chains and spreadsheet.

Recent amendments to section 16

[110] The BC legislature amended ss. 16(1)(a)(iii) and (c) of FIPPA, and the related definitions in Schedule 1 of FIPPA, effective November 25, 2021.[103] Before the amendment, and at the time the Ministry made its decision on the applicant's access request in this case, those sections read:

> 16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:
>
> ...
>
> (iii) an aboriginal government; ...
>
> (c) harm the conduct of negotiations relating to aboriginal self government or treaties.

[111] In addition, Schedule 1 of FIPPA defined "aboriginal government" as an "aboriginal organization exercising government functions."

[112] The amendments replace the term "aboriginal government" with "Indigenous governing entity" in s. 16(1)(a)(iii), and the word "aboriginal" with "Indigenous" in s. 16(1)(c). In addition, the amendments remove the definition of "aboriginal government" from Schedule 1 and replace it with the following:

> "Indigenous governing entity" means an Indigenous entity that exercises governmental functions and includes but is not limited to an Indigenous governing body as defined in the *Declaration on the Rights of Indigenous Peoples Act*.[104]

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[102] Information located on pages 1-4, 166-168, 215-225 and 229-234 of the records. The spreadsheet is the same spreadsheet as discussed above in relation to s. 13(1).
[103] *Freedom of Information and Protection of Privacy Amendment Act*, SBC 2021, c 39, ss. 8(a) and (b).
[104] *Freedom of Information and Protection of Privacy Amendment Act*, SBC 2021, c 39, s. 47(a).

[113] As detailed below, I have decided whether ss. 16(1)(a)(iii) and (c) apply based on the language before it was amended since that was what was in effect at the time the Ministry made its decision in 2020. In doing so, I rely on the well-established principle that where a legislative amendment affects substantive rights it is presumed to take effect going forward only unless there is evidence that the Legislature intended the amendment to apply to actions that took place before it came into effect. In the case of this amendment, there is no evidence of such an intention.[105] However, my analysis applies equally to the amended provisions.

[114] I will first consider s. 16(1)(a)(iii) and then, if necessary, consider s. 16(1)(c).

Section 16(1)(a)(iii) – harm the conduct of relations with aboriginal governments

[115] Section 16(1)(a)(iii) allows a public body to refuse to disclose information if the disclosure could reasonably be expected to harm the conduct of relations with Aboriginal governments.

[116] Previous OIPC orders have take a two-step approach to deciding if s. 16(1)(a)(iii) applies. The first question is whether the information at issue relates to an "aboriginal government." The second question is whether disclosure of the information in dispute could reasonably be expected to harm the conduct of relations between the provincial government and that aboriginal government.[106]

[117] In my view, a slightly different approach is required in this case. This is because the Ministry argues, in part, that disclosure of information related to one Indigenous community could reasonably be expected to harm the conduct of relations with neighbouring Indigenous communities. Following such an argument, the question is not whether the Indigenous community the information is about is an aboriginal government, but whether the neighbouring Indigenous communities qualify as aboriginal governments.

[118] As I result, I will take the following approach in deciding whether s. 16(1)(a)(ii) applies to the information at issue:

1. Could disclosure of the information in dispute reasonably be expected to harm the conduct of relations between the provincial government and an Indigenous community?

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[105] *R v Dinely*, 2012 SCC 58 at para 10. This approach was adopted in Order F23-06, 2023 BCIPC 7 at para 60 and Order F23-41, 2023 BCIPC 49 at para 111.
[106] For example, see Order F22-34, 2022 BCIPC 38 at para 140; Order F23-06, 2023 BCIPC 7 at para 62.

2. Does that Indigenous community qualify as an aboriginal government?

   Could disclosure of the information in dispute reasonably be expected to harm the conduct of relations between the provincial government and an Indigenous community?

[119] The Ministry provided extensive submissions about the history and the importance of the relationship between the Crown and Indigenous peoples.[107] The Ministry says that the provincial government has a special and historic relationship with Indigenous groups, which endures and requires that the Crown negotiate with the intention of reaching just settlement claims and fulfilling its obligations.[108] The Ministry also says that to build trusting relationships, Indigenous communities must have confidence in their communications with the Province and must not see any indicia of bad faith.[109] The Ministry also provided evidence about the specific information in dispute, which I will consider in detail below.

Spreadsheet

[120] The Ministry is withholding information about communications with Indigenous communities who are identified in the openly disclosed part of the spreadsheet.[110] The Ministry says that disclosing this information would be harmful to the provincial government's relationship and negotiations with those Indigenous communities.[111]

[121] In support of the Ministry's position, a Director at the Ministry says that in his opinion, disclosing some of the information could reasonably be expected to harm the provincial government's relationship with neighbouring Indigenous communities, as the inclusion of a subject matter or position may be incorrectly interpreted. The Director also describes some of the information as "benign" and "quite factual."[112]

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[107] Public body's initial submission at paras 117-128.
[108] Public body's initial submission at paras 117 and 119.
[109] Public body`s initial submission at para 125.
[110] The Ministry withheld the information in the spreadsheet under ss. 13(1) and 16(1). I am only considering here the information I found the Ministry was not authorized to withhold under s. 13(1).
[111] Public body's initial submission at para 135.
[112] Director's affidavit #2 at para 8. The Ministry submitted one affidavit from the Director in its initial submission package and a supplemental affidavit from the Director as part of its supplemental submission package dated February 22, 2023. Although I did not request it, I have decided to consider the Director's supplemental affidavit because it is relevant to the application of s. 16 and the applicant had an opportunity to object to the inclusion of or respond to this evidence in his supplemental response submission. I give more weight to the Director's supplemental affidavit because it is more detailed than his first affidavit. The Director also provides evidence about some information that I have already found may be withheld under s. 13(1). As a result, I will not consider that evidence here.

[122] For the reasons that follow, I am not satisfied that disclosing the information at issue in the spreadsheet could reasonably be expected to harm the conduct of relations with the relevant Indigenous communities.

[123] First, the Ministry has not explained how any of the disputed information might be misinterpreted or how such a misinterpretation could reasonably be expected to harm relations with neighbouring Indigenous communities. The information that the Ministry says might be misinterpreted appears to be factual and none of it appears to be sensitive or contentious. As a result, I am not persuaded that disclosing this information could reasonably be expected to harm the provincial government's relationships with neighbouring Indigenous communities.

[124] Second, I am not satisfied that disclosing the information the Director describes as benign and factual could reasonably be expected to harm the conduct of relations with any Indigenous communities. The Ministry has not explained how disclosing this "benign" and "factual" information could reasonably be expected harm the conduct of relations with an Indigenous community and I see no reason why it would.

[125] Finally, some of the information shows the date and the method used by the Ministry to communicate with certain Indigenous communities. This information does not appear to be sensitive and I am not satisfied that the relevant Indigenous communities would expect it to be kept in confidence. The Ministry has not explained and I do not see how disclosing this information could reasonably be expected to harm the conduct of relations with any Indigenous communities.

[126] For all these reasons, I conclude that disclosing the information at issue in the spreadsheet could not reasonably be expected to harm the conduct of relations with any Indigenous communities. As a result, I do not need to consider whether any of those communities qualify as aboriginal governments under FIPPA.

Email chains

[127] The Ministry is withholding several email chains in their entirety. The Ministry says that releasing sensitive information in the emails would be harmful to the Province's relationship and negotiations with the Nation.[113] The applicant does not say anything about whether s. 16(1)(a)(iii) applies to the email chains.

[113] Public body's initial submission at para 136; Director's affidavit #1 at para 32; Regional Executive Director's affidavit at para 34.

[128] The disputed email chains start with emails between representatives of the Nation and Commission employees. Those emails are then shared and discussed by several provincial government employees.

[129] I can see that some of the information in the emails could be considered sensitive or contentious. I am also satisfied that the Nation's representative would expect the information they provided to not be openly disclosed. Additionally, in my view, disclosing some of the information in the emails between provincial government employees could reasonably be expected to harm the conduct of relations with the Nation. I cannot say more about that information without revealing the information in dispute. For these reasons, I conclude that disclosing some of the information in the emails could reasonably be expected to harm the conduct of relations with the Nation.

[130] However, I am not persuaded that disclosing the balance of the information in the email chains could reasonably be expected to harm the conduct of relations with the Nation or any other Indigenous community. This information includes:

- Page numbers;
- The dates and times of emails;
- The names, email addresses, and email signatures of government employees; and
- Phrases commonly used in email correspondence, such as greetings and information about the device used to send an email.

[131] In my view, none of this information reveals anything significant about any Indigenous community or public body. I cannot see, and the Ministry has not explained, how disclosing any of this information could reasonably be expected to harm the provincial government's relations with the Nation or any other Indigenous community. Therefore, I find that s. 16(1)(a)(iii) does not apply to this information.

Is the Nation an aboriginal government under FIPPA?

[132] I found above that disclosing some of the information at issue in the email chains could reasonably be expected to harm the conduct of relations with the Nation. Thus, I must decide whether the nation is an aboriginal government for the purposes of FIPPA.

[133] The Ministry says that where there is evidence that an Indigenous group has provided the Province with notice that a particular representative body has the authority to negotiate on their behalf, that entity should be considered an "Indigenous governing entity."[114] More specifically, the Ministry says that the

[114] Public body's initial submission at para 107.

Indigenous groups the Assessment Office consulted in relation to the amendment application and the Indigenous groups in exhibit A to the Director's affidavit should be considered Indigenous governing entities.[115]

[134] Previous OIPC orders have found that the term "aboriginal government" is not limited to bands or groups that have concluded self-government agreements or treaties.[116] In Order 01-13, former Commissioner Loukidelis held that "at the very least, an 'aboriginal government' includes a 'band' as defined in the Indian Act (Canada)."[117]

[135] I can see from the records that the Nation is a band as defined in the *Indian Act* and that it was exercising representative functions in communicating with public bodies about Coastal GasLink. As a result, I find that the Nation qualifies as an "aboriginal government" under FIPPA.

[136] I conclude that s. 16(1)(a)(iii) applies to some, but not all, of the information at issue in the email chains.

Section 16(1)(c) – harm the conduct of negotiations relating to aboriginal self government or treaties

[137] I found the information at issue in the spreadsheet and some information in the email chains withheld under s. 16(1) could not be withheld under s. 16(1)(a)(iii). Therefore, I will consider whether the Ministry can withhold it under s. 16(1)(c).

[138] Section 16(1)(c) allows a public body to refuse to disclose information if the disclosure could reasonably be expected to harm the conduct of negotiations relating to aboriginal self-government or treaties.

[139] The Ministry says that disclosing some of the disputed information would be harmful to the province's negotiations with Indigenous communities, including the Nation. However, the Ministry has not identified any negotiations relating to aboriginal self government or treaties that might be at risk of harm. In my view, the Ministry has not provided sufficient evidence to establish that disclosure of any of the information withheld under s. 16(1) could reasonably be expected to harm the conduct of negotiations relating to aboriginal self-government or treaties. As a result, I find that s. 16(1)(c) does not apply to the information I found could not be withheld under s. 16(1)(a)(iii).

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[115] Public body's initial submission at para 108.
[116] Order 01-13, 2001 CanLII 21567 at para 14, citing Order No. 14-1994, [1994] BCIPCD No 17.
[117] Order 01-13, 2001 CanLII 21567 at para 14.

Summary, s. 16(1)

[140] I conclude that disclosing some of the information in the email chains could reasonably be expected to harm the conduct of relations with the Nation, which qualifies as an aboriginal government. Therefore, the Ministry is authorized to withhold that information under s. 16(1)(a)(iii).

[141] However, I conclude that disclosing the rest of the information at issue in the email chains and all of the information at issue in the spreadsheet could not reasonably be expected to harm the conduct of relations with an aboriginal government or harm the conduct of negotiations relating to aboriginal self government or treaties. Therefore, the Ministry is not authorized to withhold that information under s. 16(1)(a)(iii) or s. 16(1)(c). I have highlighted the information that may not be withheld under s. 16(1) in a copy of the records that will be provided to the Ministry with this order.

Exercise of discretion under ss. 13(1), 14 and 16(1)

[142] The word "may" in ss. 13(1), 14 and 16(1) confers on the head of a public body the discretion to disclose information that it is authorized to withhold under those sections. If the head of a public body has failed to exercise its discretion, the Commissioner can require the head to do so. The Commissioner can also order the head of the public body to reconsider the exercise of discretion where the decision was made in bad faith or for an improper purpose, the decision took into account irrelevant considerations, or the decision failed to take into account relevant considerations.[118]

[143] The applicant says that:

- The Ministry applied an overly broad interpretation of the relevant FIPPA disclosure exceptions;[119]
- The Ministry subjectively and improperly exercised its discretion under s. 13(1), and withheld information that would prove interference, misfeasance, and malfeasance, causing harm to his business and reputation;[120] and
- The Ministry exercised improper discretion in applying ss. 14 and 16(1) and deliberately omitted certain documents from the records package.[121]

[118] *John Doe*, *supra* note 75 at para 52. See also Order 02-38, 2002 CanLII 42472 (BC IPC) at para 147.
[119] Applicant's response submission at para 41.
[120] Applicant's response submission at para 44.
[121] Applicant's supplemental response submission at para 27.

[144] The Ministry says that it properly exercised its discretion pursuant to s. 13(1).[122] The Regional Executive Director says that he was involved in the Ministry's review and approval of all the records in dispute in the inquiry, and that he believes the Ministry executive involved in sign-off of the records considered the following factors in exercising discretion to withhold information:

- The general purposes of FIPPA;
- The wording of the sections and the interests of all parties;
- The historical practices of the Ministry;
- The harm to the Ministry if such information is disclosed;
- The age of the requested records;
- The need to receive fulsome opinions and advice from Ministry employees;
- The nature of the records and the extent to which they are significant and/or sensitive to the Ministry; and
- The relevance, or lack thereof, of the material made or not made available.[123]

[145] Although the Ministry only submits that it properly exercised its discretion under s. 13(1), I can see that the Regional Executive Director's evidence is about the overall review and approval of the severing of the records and is not limited to s. 13(1). As a result, I accept that the Ministry considered the factors listed above in applying ss. 13(1), 14, and 16(1) to the records at issue. I am, therefore, satisfied the Ministry reflected on whether to release or withhold information under ss. 13(1), 14 and 16(1).

[146] Moreover, there is nothing in the records or the parties' submissions that supports concluding the Ministry exercised its discretion in bad faith or for an improper purpose or based on irrelevant considerations. I find that the applicant's allegations that the Ministry improperly exercised its discretion are speculative. His allegations are not supported by persuasive evidence or what is revealed by the records and how they have actually been severed. For example, contrary to the applicant's assertions, the information withheld under s. 13(1) is not indicative of any interference, misfeasance or malfeasance.

[147] For these reasons, I find that the Ministry appropriately exercised its discretion in deciding whether to release or withhold information under ss. 13(1), 14 and 16(1).

[122] Public body's initial submission at para 63.
[123] Regional Executive Director's affidavit at para 37.

Unreasonable Invasion of Personal Privacy, s. 22(1)

[148] Section 22(1) requires a public body to refuse to disclose personal information if its disclosure would be an unreasonable invasion of a third party's personal privacy.[124]

[149] The records at issue under s. 22 are emails. In those emails, the Ministry is withholding a third party's email address and information that reveals a Ministry employee's vacation plans under s. 22(1).[125]

Personal information

[150] The first step in any s. 22 analysis is to determine if the information at issue is personal information.

[151] Personal information is defined in FIPPA as "recorded information about an identifiable individual other than contact information."[126] FIPPA defines contact information 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."[127]

[152] Under the definitions in Schedule 1 of FIPPA, if information is contact information, it is not considered to be personal information. Whether information is contact information depends on the context in which it appears.[128] For example, where a personal address is repeatedly used for sending and receiving email messages in the ordinary course of conducting the third party's business affairs, the email address comprises contact information.[129]

[153] The Ministry says that the information in dispute is personal information. Specifically, the Ministry says that the third party's email address is personal information because:

- The Ministry was unable to confirm or obtain any evidence regarding whether the email address was known to the applicant or if the email address was being used in a business context;[130]

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[124] Schedule 1 of FIPPA says: "third party" in relation to a request for access to a record or for correction of personal information, means any person, group of persons, or organization other than (a) the personal who made the request, or (b) a public body.
[125] Information located on pages 196-197 of the records.
[126] Schedule 1 of FIPPA.
[127] Schedule 1 of FIPPA.
[128] Order F20-13, 2020 BCIPC 15 at para 42.
[129] Order F15-22, 2015 BCIPC 36 at para 31.
[130] Public body's initial submission at para 154.

- There is no indication that the email address is repeatedly being used for sending and receiving email messages in the ordinary course of conducting the third party's business affairs;[131] and
- The email address ends in a domain name commonly associated with personal email addresses.[132]

[154] I find that all of the disputed information is personal information. The information that reveals the employee's vacation plans is clearly recorded information about that employee. Regarding the email address, I can see that the email address is derived from a person's name and that the domain for the email address is not associated with a workplace. I also find that the email address was not being used for business purposes. Therefore, considering the context in which the third party's email address appears in the records and some of the factors outlined by the Ministry, I find that the third party's email address is the third party's personal information and not contact information. Therefore, I conclude that all of the information in dispute under s. 22(1) is the personal information of third parties.

Disclosure not an unreasonable invasion of privacy, s. 22(4)

[155] The second step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4). If so, disclosure would not be an unreasonable invasion of a third party's personal privacy.

[156] The Ministry says that there is no evidence to suggest that s. 22(4) applies.[133] The applicant does not say anything about s. 22(4).

[157] I have considered all of the types of information listed in s. 22(4) and I find that none of them apply.

Presumptions of unreasonable invasion of privacy, s. 22(3)

[158] The third step in the s. 22 analysis is to determine whether s. 22(3) applies to the personal information. If so, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy.

[159] The Ministry says that none of the presumptions under s. 22(3) apply.[134] The applicant does not say anything about s. 22(3).

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[131] Public body's initial submission at para 156.
[132] Public body's initial submission at para 156.
[133] Public body's initial submission at para 157.
[134] Public body's initial submission at para 160.

[160] I have considered all of the presumptions in s. 22(3), and I find that none of them apply.

Relevant circumstances, s. 22(2)

[161] The final step in the s. 22 analysis is to consider the impact of disclosure of the personal information in light of all relevant circumstances, including those listed in s. 22(2). It is at this step that the s. 22(3) presumptions may be rebutted.

[162] The Ministry says that s. 22(2)(a) does not weigh in favour of disclosure.[135] The applicant does not say anything about s. 22(2).

[163] I have considered whether any relevant circumstances apply, including those listed under s. 22(2). I will address all of these circumstances below.

Section 22(2)(a)

[164] 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. Section 22(2)(a) recognizes that where disclosure of the information in dispute would foster accountability of a public body, this may provide a foundation for finding that disclosure would not constitute an unreasonable invasion of a third party's personal privacy.[136]

[165] The personal information at issue is about a member of the public and about the personal life of a public body employee. I do not see how its disclosure would subject the provincial government or any public body to public scrutiny. I find that subjecting the activities of the provincial government or a public body to public scrutiny does not weigh in favour of disclosing the personal information in dispute.

Applicant's existing knowledge

[166] Previous orders have found that a relevant circumstance in favour of disclosure under s. 22(2) is the fact that an applicant is aware of or already knows the personal information in dispute.[137] The applicant already knows the employee's vacation plans because this information was openly disclosed elsewhere in the records.[138] In my view, this weighs in favour of disclosing the information that reveals the employee's vacation plans.

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[135] Public body's initial submission at para 163.
[136] Order F05-18, 2005 CanLII 24734 (BC IPC) at para 49.
[137] Order F19-02 2019 BCIPC 2 at para 73; Order F17-02, 2017 BCIPC 2 at paras 28-30.
[138] I have not identified where this information is located in the records since it would disclose the information in dispute.

Conclusion, s. 22(1)

[167] I find the information that reveals an employee's vacation plans and the third party's email address qualify as personal information under FIPPA.

[168] I do not see any relevant circumstances that weigh for or against disclosing the third party's email address. The applicant has not provided any reason why the third party's email address in particular should be disclosed and I am not satisfied that it should be. In my view, it would be an unreasonable invasion of the third party's personal privacy to disclose his email address. Therefore, I conclude the Ministry must refuse to disclose this information under s. 22(1).

[169] I find it would not be an unreasonable invasion of a third party's personal privacy to disclose the employee's vacation plans because the applicant already knows this information. The applicant was provided with a copy of the records where this information is disclosed. The Ministry did not explain how disclosing this information a second time would unreasonably invade the employee's personal privacy. Therefore, I find the Ministry is not required to refuse to disclose this information under s. 22(1).

CONCLUSION

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

1. I confirm, in part, the Ministry's decision to refuse the applicant access to the information withheld under s. 13(1).

2. I confirm, in part, the Ministry's decision to refuse the applicant access to the records withheld under s. 14.

3. I confirm, in part, the Ministry's decision to refuse the applicant access to the information withheld under s. 16(1)(a)(iii). The Ministry is not authorized to withhold any of the information at issue under s. 16(1)(c).

4. I confirm, in part, the Ministry's decision to refuse the applicant access to the information withheld under s. 22(1).

5. The Ministry is required to give the applicant access to the information that I have determined it is not authorized or required to withhold under ss. 13(1), 16(1)(a)(iii), 16(1)(c) and 22(1). I have highlighted this information on pages 1-4, 166-168, 195, 197, 215-221 and 229-234 of the copy of the records that will be provided to the Ministry with this order.

6. The Ministry must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records/pages described at item 5 above.

[171] Pursuant to s. 59(1), the Ministry is required to comply with the above order by **August 11, 2023**.

[172] Pursuant to ss. 44(1) and (3), I require the Ministry to produce for my review a copy of pages 170-85, 222-225 and 235-238 by **July 13, 2023** so that I may determine whether the Ministry is authorized to withhold this information under s. 16(1).

June 28, 2023

ORIGINAL SIGNED BY

Elizabeth Vranjkovic, Adjudicator

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