Order F23-101

DOUGLAS COLLEGE

Allison J. Shamas
Adjudicator

November 28, 2023

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Summary: The applicant, an instructor at Douglas College, requested that the college provide her with all records related to her employment. Douglas College disclosed the responsive records but withheld some information under ss. 13(1) (advice and recommendations), 14 (solicitor-client privilege), and 22(1) (unreasonable invasion of third's party's personal privacy) of the *Freedom of Information and Protection of Privacy Act.* The adjudicator confirmed the College's decision under s. 14 in full, and its decision under ss. 13(1) and 22(1) in part. The adjudicator ordered the College to disclose the information it was not authorised or required to withhold under ss. 13(1) and 22(1), and to provide a summary of certain information supplied in confidence about the applicant under s. 22(5).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165 ss. 13(1), 13(2)(a), 14, 22(1), 22(2)(c), 22(2)(e), 22(2)(f), 22(2)(g), 22(2)(h), 22(3)(a), 22(3)(d), 22(5), and 44(1).

INTRODUCTION

[1] The applicant, an instructor at Douglas College (the College), requested that the College provide her with all records related to her employment. The College provided her with 2,468 pages of responsive records but withheld some information from those records under ss. 13 (policy advice or recommendations), 14 (solicitor-client privilege), and 22(1) (unreasonable invasion of third party's personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the College's decision.

[3] During mediation, the applicant confirmed that she was not seeking access to email communications in which she was sender, recipient, or copied.[1]

[4] Mediation did not resolve the matter and the request proceeded to inquiry.

[5] At the inquiry the College provided 1795 pages of responsive records. Some of those records contained individual emails on which the applicant was sender, recipient or copied. During the inquiry, both parties confirmed that these individual emails were not in dispute.[2] As a result, I will not consider whether the College is authorized or required to withhold information in any email to which the applicant was a party.[3]

[6] There were three rounds of substantive submissions in this inquiry. The first was the initial round of submissions that occurs in every inquiry. The second arose in response to the applicant's objection to the scope of the College's reply.[4] The third round arose during the inquiry when I gave the College an opportunity to provide additional information in support of its assertion of solicitor-client privilege.[5] Subject to my comments below under "preliminary matters," I have considered the evidence and argument submitted by both parties in all three rounds of submissions.

PRELIMINARY MATTERS

[7] The parties raise a number of preliminary matters which I will address now.

Section 6(1) - Duty to Assist Applicants

[8] The applicant raised a s. 6(1) issue in her response submission and made additional references to the College's duties under s. 6(1) in a subsequent round of submissions.[6] The College argued that her submissions regarding s. 6(1) should be disregarded because the issue of the College's effort to discharge its duties under s. 6(1) was outside the scope of the inquiry.

[9] Section 6(1) was not an issue listed on the notice of inquiry. The notice of inquiry that the OIPC sent to the parties expressly stated, "parties may not add

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[1] See OIPC fact report.
[2] See adjudicator letters dated October 10 and 16, 2023, applicant's emails dated October 10, and 16, 2023, and public bodies' letter dated October 11, 2023.
[3] The severed information that is not in dispute is found on pages 89-90, 137, 329-330, 543, 1029-1030, 1141, 1153-1154, 1156, 1158, 1410, 1412, 1415, 1423, 1428-1433, 1436-1437, 1438-1440, 1447, 1452-1453, 1523, 1570, 1592-1594, 1617, 1666 of the records.
[4] See registrar's email dated March 17, 2023, applicant's supplemental submission (undated but filed on March 31, 2023), and College's submission dated April 12, 2023.
[5] See adjudicator's letters dated September 27, 2023 and October 31, 2023; College's submission dated October 11, 2023; and applicant's submission dated October 23, 2023, and College's submission dated November 10, 2023.
[6] See applicant correspondence dated October 22, 2023.

new exceptions or issues without the OIPC's prior consent." The applicant did not seek permission to add s. 6(1) as an issue or explain why she should be permitted to do so at this late stage. Previous OIPC orders have consistently held that new issues raised in a party's inquiry submission without the OIPC's prior authorization will not be considered.[7]

[10] There are good reasons for this practice. Most issues that come to the OIPC can be resolved or refined through the OIPC's investigation and mediation processes, without the need for a formal inquiry. When a new issue is added at the inquiry stage, both the parties and the OIPC are denied access to these early resolution procedures.

[11] In the circumstances, I see no basis to depart from the OIPC's usual practice, and I decline to add s. 6(1) as an issue to this inquiry.

Section 25 – Disclosure in the Public Interest

[12] In her response submission, the applicant also asserted that disclosure of the withheld information was in the public interest. The College stated that to the extent the applicant was attempting to raise s. 25, it objected to the issue being raised for the first time during the inquiry and submitted that it should be disregarded.

[13] Having considered the applicant's submissions, I find that they do not raise a new issue, but instead relate to the appropriateness of the College's exercise of discretion under s. 13(1). The College also addresses the public interest in its submissions about its exercise of discretion under s. 13(1). Accordingly, I will consider both parties' submissions about the public interest as they relate to the College's exercise of discretion under s. 13(1).

[14] To the extent that the applicant did intend to raise s. 25 as an independent issue in her inquiry submission, for the reasons set out in respect of s. 6(1), I decline to add s. 25 as an issue.

Scope of the Inquiry

[15] Finally, the College asked that I disregard several of the allegations made by the applicant. The impugned allegations relate to the College's approach to the applicant's request for accommodation, disability issues in general, the Covid-19 pandemic and workplace investigations, and include specific criticisms about employees and contractors hired by the College.

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[7] For examples where the OIPC has refused to permit a party to raise a s. 6(1) issue, see Order F21-23, 2021 BCIPC 28 (CanLII) at para 7, Order F18-11, 2018 BCIPC 14 (CanLII) at para 3, and Order F23-31, 2023 BCIPC 37 (CanLII) at para 5. See also the OIPC's Written Instructions for Inquiries at pp. 3.

[16] In support of its request, the College disputed the allegations, asserted that they were unfounded, and argued they were outside of the jurisdiction of the OIPC. It also asserted that the applicant made some of the allegations for the improper purpose of impugning the character of the College, its officials, and its legal counsel.

[17] It is clear from the applicant's submission that she has strong objections to the way the College handled various issues related to her employment. The applicant's views are part of the context for the inquiry, and I will consider them accordingly. However, my task in this inquiry is to dispose of the issues set out in the notice of inquiry – that is to determine whether certain FIPPA exceptions to disclosure apply to the information in dispute. To do so it is not necessary for me to make findings about the allegations described above, and accordingly, I will not do so.

ISSUES

[18] The issues before me are:

1. Whether the College is authorized to refuse to disclose the information at issue under ss. 13(1) and 14 of FIPPA.
2. Whether the College is required to refuse to disclose the information at issue under s. 22(1) of FIPPA.

[19] Section 57(1) of FIPPA places the burden on the College to prove that the applicant has no right of access to the information withheld under ss. 13(1) and 14. While under s. 22(1) the College must establish that the information in dispute is personal information of a third party,[8] s. 57(2) places the burden on the applicant to prove that disclosure of any personal information would not be an unreasonable invasion of a third party's personal privacy.

BACKGROUND

[20] The College is a post-secondary institution with campuses in Metro Vancouver. The applicant has been employed by the College as an instructor since the late 1990s. It is clear from the records and the applicant's submissions that the relationship between the applicant and the College is strained.

[21] The applicant made a bullying and harassment complaint against another College employee (the Bullying and Harassment Complaint). In response, the College hired a third-party investigator to conduct a workplace investigation who found the allegations were without merit. The applicant appealed the findings in the report, and the College dismissed her appeal (the Appeal). The applicant

[8] Order 03-41, 2003 CanLII 49220 (BC IPC) at paras 9-11.

continues to take issue with the process and outcome of the investigation and Appeal.

[22] The applicant also made a request for accommodation related to a disability (Accommodation Request). However, the parties never reached an agreement about an appropriate accommodation.

[23] Finally, in 2021 the applicant filed a complaint with the BC Human Rights Tribunal alleging discrimination on the basis of disability (the Human Rights Complaint). The Human Rights Complaint remains ongoing.

RECORDS AND INFORMATION AT ISSUE

[24] The College withheld information from approximately 240 pages of the 1795 pages of responsive records. The information in dispute is found primarily in records relating to the applicant's Bullying and Harassment Complaint, Accommodation Request, and Human Rights Complaint. The records are email chains, attachments to emails, and the investigation report into the Bullying and Harassment Complaint.

SECTION 14 - SOLICITOR-CLIENT PRIVILEGE

[25] Section 14 provides that the head of a public body may refuse to disclose information that is subject to solicitor-client privilege. It encompasses solicitor-client privilege and litigation privilege.[9]

[26] The information the College withheld under s. 14 relates to the Human Rights Complaint and one other undisclosed matter. The withheld information is found in email communications and the attachments to those email communications. The College claims both solicitor-client privilege and litigation privilege.

[27] The College did not provide the information it withheld under s. 14 for my review. Instead, it relies on affidavit evidence. The applicant requests that I order the College to produce unredacted copies of the s. 14 information for review. Noting the court's reluctance to require production of privileged records, the College submits that these are not appropriate circumstances to do so.

[28] I will address the applicant's request for a production order first, followed by the College's assertion of solicitor-client privilege, and then its assertion of litigation privilege.

[9] Order F22-64, 2022 BCIPC 72 (CanLII) at para 15.

The Applicant's Request for a Production Order

[29] Section 44 of FIPPA empowers the Commissioner to order production of records over which solicitor-client privilege is claimed.[10] However, the Commissioner exercises this authority cautiously and with restraint given the clear direction by the courts that a reviewing body's decision to examine privileged documents must never be made lightly or as a matter of course.[11] Given the importance of solicitor-client privilege, and in order to minimally infringe on that privilege, the Commissioner will only order production of records being withheld under s. 14 when it is absolutely necessary to decide the issues in dispute.[12]

[30] As to when it would be appropriate to order production of records withheld under s. 14, prior jurisprudence has found it may be necessary and appropriate for the Commissioner to exercise their discretion under s. 44 in the following circumstances:

- When the party claiming privilege cannot provide the information required to establish privilege, such as affidavit evidence, without revealing the privileged information itself.[13]

- When the evidence describing the records is not sufficient to adjudicate the privilege claim.[14]

- Where there is some evidence that the party claiming privilege has done so "falsely"[15] or inappropriately.[16]

[31] I will address the parties' arguments as they relate to each of the three categories.

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[10] Section 44(1)(b) of FIPPA states the Commissioner may order the production of a record, and s. 44(2.1) reinforces that such a production order may apply to a record that is subject to solicitor-client privilege.
[11] Order F19-21, 2019 BCIPC 23 (CanLII) at para 46, citing *GWL Properties Ltd. v WR Grace & Co. of Canada Ltd*., 1992 CanLII 182 (BCSC) at pp. 11-12.
[12] Order F19-14, 2019 BCIPC 16 (CanLII) at para 10; *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 [*Blood Tribe*]at para 17*; Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 (CanLII) at para 68.
[13] *Gichuru v British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259 (CanLII) [*Gichuru*] at para 43; *Keefer Laundry Ltd. v Pellerin Milnor Corp. et. al*., 2006 BCSC 1180 at para 75; Order F19-21, 2019 BCIPC 23 (CanLII) at paras 47 and 118.
[14] Order F17-42, 2017 BCIPC 46 (CanLII) at para 11; Order F19-21, 2019 BCIPC 23 (CanLII) at para 121.
[15] *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 (CanLII) at para 70.
[16] Order F17-43, 2017 BCIPC 47 at para 33; Order F19-21, 2019 BCIPC 23 (CanLII) at para 61.

College provided evidence to establish privilege without revealing privileged information

[32] Neither party addressed this consideration. I find that this is not a situation where the College is unable to establish privilege without revealing the privileged information itself. The College has in fact provided submissions and evidence to support its claim of privilege over the disputed records.

Evidence is sufficient to adjudicate privilege claim

[33] The applicant argues that the College's evidence is not sufficient, calling the College's evidence "mere assertions,"[17] and asserting that the College did not disclose the names of the sender and recipient of the records. The College asserts that it provided ample evidence to support its assertion of solicitor-client privilege.

[34] I find that this is not a situation where the evidence describing the records is not sufficient to adjudicate the privilege claim. The courts and previous OIPC orders set out the legal principles that apply where a public body elects not to provide the records withheld under s. 14 for inspection. Although each case depends on its own facts, some general principles nonetheless arise:[18]

- a party claiming privilege must list each disputed record separately and provide, without revealing privileged information, a description of the record in sufficient detail to allow an opposing party to assess the claim of privilege;[19]
- the description of the record should include the date it was created or sent, the nature of the communication (e.g., "email"), and the names of the author and the recipient(s);[20]
- in addition to a proper description of the disputed records, the party claiming privilege must provide evidence to substantiate the privilege claim;

[17] Applicant's submission dated October 22, 2023 at para 48.
[18] For a detailed discussion of the applicable principles see *British Columbia (Minister of Finance) v British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 (CanLII) [*Minister of Finance*] at paras 77 - 88.
[19] Order F20-16, 2020 BCIPC 18 (CanLII) at para 9; Order F20-16, 2020 BCIPC 18 (CanLII) at para 9; *Gardner v Viridis Energy Inc*, 2013 BCSC 580 (in Chambers) at para 36.
[20] In *Minister of Finance, ibid* at para 81 Justice Steeves stated: "it would be an unusual situation where the date of the document and the names of the sender and recipient are not disclosed for each document. … Certainly, an explanation would be required if this information cannot be provided." See also *Anderson Creek Site Developing Limited v Brovender*, 2011 BCSC 474 [*Anderson Creek*] at para 114, and F20-16, 2020 BCIPC 18 (CanLII) at para 9.

- it is not enough to merely assert that privilege applies, and conclusory statements unsupported by facts do not suffice;[21]
- ideally, affidavit evidence in support of a privilege claim should avoid hearsay and come from an affiant with direct knowledge of the disputed records;[22] and
- it is helpful, and in some cases even necessary, to have affidavit evidence from a lawyer, who is an officer of the court and has a professional duty to ensure that privilege is properly claimed.[23]

[35] In this case, the College provided affidavit evidence from two lawyers at an external law firm (the Lawyer and the Primary Lawyer), a lawyer at an employers' association (the Association Lawyer), and its Manager of Records and Information Management (the Manager). The three lawyers state that they are practicing lawyers. They depose that they personally reviewed the records in preparing their affidavits, and that they represented the College on matters about which they provided evidence.[24] The Primary Lawyer identified the sender, recipients, and dates of each withheld communication in a table of records which formed part of his affidavits. All three lawyers provided additional evidence about the nature of the solicitor-client relationships and communications at issue.

[36] The Manager deposed that they were responsible for locating, reviewing, and preparing the responsive records for disclosure to the applicant, and that they had personal knowledge of the matters at issue in this inquiry.[25] The Manager provided factual information about the records in dispute such as the sender and recipient and the dates on which the communications were exchanged, as well as information about the College's exercise of discretion under s. 14.

[37] The College provided far more than "mere assertions" to support its claim of privilege. As for the applicant's argument that the College failed to disclose the names of the sender and recipient of the records, the Primary Lawyer provided this information for each withheld record in the third round of submissions. Based

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[21] See *Nelson and District Credit Union v Fiserv Solutions of Canada, Inc*., 2017 BCSC 1139 (CanLII) at para 52; *Intact Insurance Company v 1367229 Ontario Inc*, 2012 ONSC 5256 at para 22; *Nanaimo Shipyard Ltd. v Keith et al*, 2007 BCSC 9 (CanLII) [*Nanaimo*] at paras 15 and 29; and Order F20-16, 2020 BCIPC 18 (CanLII) at para 10; Order F19-14, 2019 BCIPC 16 (CanLII) at para 38; and Order F19-14, 2019 BCIPC 16 (CanLII) at para 38.
[22] See Order F20-16, 2020 BCIPC 18 (CanLII) at para 10 and see *Minister of Finance supra* note 18 at para 82 in which the BC Supreme Court endorsed the statement in Order F20-16.
[23] See *Minister of Finance, supra* note 18 at paras 82 and 83 and Order F20-16, 2020 BCIPC 18 (CanLII) at para 10
[24] While initially the Lawyer provided evidence about a communication about which she did not appear to have direct knowledge, the College subsequently provided evidence from the Association Lawyer about the same record.
[25] Affidavit of the Manager at paras 1 and 2.

on the legal principles set out above, I find that the College's evidence is sufficient to adjudicate its assertion of privilege.

No evidence College claimed privilege falsely or inappropriately

[38] The applicant argues that the College's decision to withhold entire records is unusual and seems like an attempt to conceal evidence rather than genuinely protect solicitor-client privilege. She also asserts that the crime-fraud exception to privilege applies to the information the College withheld under solicitor-client privilege. In this regard, she argues that the College conducted a "sham"[26] workplace investigation into her Bullying and Harassment Complaint and then obtained legal advice to "reject [her Appeal of the investigation] without regard for the truth,"[27] thereby denying her protection against workplace bullying and harassment and discrimination under the *Human Rights Code.*

[39] In support of her position, the applicant states that she was mistreated by both the investigator responsible for the investigation and a College representative responsible for her Appeal. She also cites statements she attributes to online criticism about the investigator and concerns from the union about fairness and equity in respect of the College's workplace investigations. Relying on these statements, the applicant argues that the reason the College withheld communications from around the time of her Appeal was to hide solicitor-client communications relating to quashing the Appeal without regard for the truth. That truth, according to the applicant, was that the conduct at issue in the report engaged the *Human Rights Code* and her Appeal should have been granted.

[40] The College requests that I dismiss the applicant's argument about the crime-fraud exception on a preliminary basis because it was raised late. In the alternative it argues that the applicant has failed to establish that the exception applies. In this regard, characterizing the applicant's arguments as assertions that she was not accommodated in accordance with the *Human Rights Code* and that she was not provided with a harassment-free workplace, the College argues that she had not cited any allegation or evidence that "fraud" or any "crime" has been committed. It disputes her allegations that it failed to meet its obligations under the *Human Rights Code* or to protect her from a harassment-free workplace. Finally, it asserts that even if her allegations did amount to "crime" or "fraud," which it denies, her argument that the College was actively trying to breach its employment responsibilities is entirely speculative, and therefore does not meet the threshold required to establish a *prima facie* case.

[26] Applicant's submission dated October 22, 2023 at para 17.
[27] Applicant's submission dated October 22, 2023 at para 19.

[41] For the reasons below, I find that there is no evidence that the College claimed privilege falsely or inappropriately.

[42] Contrary to the applicant's assertion, the College's decision to withhold entire records under s. 14 is not usual. It is well-established that once privilege has been established, it applies "to all communications made within the framework of the solicitor-client relationship."[28] Moreover, the BC Court of Appeal has warned against redacting and releasing privileged communications due to a "real risk that privilege might be eroded by enabling the applicant … to infer the content of legal advice."[29] For these reasons, the OIPC routinely receives and accepts fully redacted records under s. 14. I do not accept that the College's decision to withhold entire records evidences an improper attempt to conceal evidence.

[43] I now turn to the crime-fraud exception. The crime-fraud exception doctrine holds that where communications between solicitor and client are made with a view to obtaining legal advice to facilitate unlawful conduct, solicitor-client privilege does not apply."[30] The rationale for the exception is that facilitating unlawful conduct does not come within the scope of a lawyer's professional duties.[31] However, it does not matter whether the solicitor was an "unwitting dupe or [a] knowing participant,"[32] what is key is the client's knowledge and purpose.

[44] In this regard, the challenged communications must pertain to proposed future conduct, the client must be seeking to advance conduct which it knows or should know is unlawful, and the wrongful conduct being contemplated must be clearly wrong.[33] These "stringent requirements"[34] protect legitimate consultations such as inquiries by clients who are uncertain about the legal implications of a proposed course of action (whether or not it is unlawful), or who are seeking legal advice about how to address the ramifications of past unlawful conduct, both which fall within the legitimate purview of a lawyer's activity from disclosure.[35]

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[28] *British Columbia (Attorney General) v Lee,* 2017 BCCA 219 (CanLII) [*Lee*] at para 32; *Descôteaux v Mierzwinski,* 1982 CanLII 22 (SCC) at 892-893 [*Descôteaux*].
at p. 893; *Maranda v Richer*, 2003 SCC 67 at para 22.
[29] *Lee, ibid* at para 40.
[30] *Camp Development Corporation v South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at paras 40-46 [*Camp Developments*] at para 22.
[31] *Huang v Silvercorp Metals Inc*., 2017 BCSC 795 [*Huang*] at para 174.
[32] *Solosky v The Queen,* 1979 CanLII 9 (SCC) [*Solosky*] at 835-36.
[33] *Camp Developments supra* note 30 at para 24.
[34] *Camp Development supra* note 30 at para 28. In addition, in *Blood Tribe supra* note 12 at para 10 the Supreme Court of Canda called the exception "extremely limited."
[35] *Camp Development supra* note 30 at para 28.

[45] Finally, despite its name, the exception encompasses wrongful acts that are not criminal in nature,[36] and includes breaches of regulatory statutes, breaches of contract, and torts and other breaches of duty." [37]

[46] A party seeking to invoke the exception must establish a *prima facie* case that the exception applies.[38] To do so, more than a mere assertion or allegation is required; there must be some *prima facie* evidence to give colour to the charge, in light of the surrounding circumstances.[39] However, it is not necessary for the decision maker to weigh conflicting evidence and make findings of fact.[40]

[47] Where an applicant establishes a *prima facie* case, the decision-maker must then review the documents in question to ascertain whether the exception applies or whether the asserted privilege properly exists.[41]

[48] I will not address the College's preliminary objection because it is clear on the substance of the parties' submissions that the crime-fraud exception does not apply.

[49] The College's argument that the applicant has alleged no crime or fraud concerns the breadth of the crime-fraud exception. As set out above, the exception applies to all unlawful conduct including breaches of statute and contract, not just crime and fraud. Taken at its highest, the applicant's argument is that the College conducted a sham investigation and then a College employee who disliked the applicant sought out legal advice for the purpose of rejecting her Appeal of the investigation without regard for the truth, thereby denying her protection from bullying and harassment under the *Human Rights Code.* While every case must be determined on its own facts, as a legal matter, I am not prepared to accept that this argument, if proven, could never form the basis of the crime-fraud exception. Therefore, I will not dismiss the applicant's argument on the basis that she has not alleged an actual crime or fraud.

[50] Accordingly, I now turn to the College's argument that the applicant failed to plead a *prima facie* case.

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[36] *Goldman, Sachs & Co. v Sessions*, 1999 CanLII 5317 (BC SC) [*Goldman*] at para 16. See also *Camp Development supra* at note 30 at para 23.
[37] *Goldman supra* note 36 at para 36. See also *Camp Development supra* at note 30 at para 23.
[38] *Camp Developments supra note* 30 at para 24.
[39] *Huang, supra* note 31 at para 180; *McDermott v McDermott,* 2014 BCSC 534 (CanLII) [*McDermott*] at para 77; and *British Columbia (Director of Civil Forfeiture) v PacNet Services Ltd.*, 2023 BCSC 692 (CanLII) [*PacNet*] at paras 45 – 49.
[40] *Huang supra* note 31 at para 180 at *PacNet supra* note 39 at para 45.
[41] *Huang supra* note 31 at para 180; *McDermott supra* note 39 at para 78; *Camp Developments, supra* note 30 at para 24.

[51] The difficulty with the applicant's case is that she did not provide a single assertion of fact to support the most fundamental aspect of her argument – that the College sought out legal advice for unlawful purposes. The applicant's only factual statements relate to the quality and fairness of the investigation report and her relationships with the investigator and College official responsible for her Appeal of the investigation report. Even if true, these assertions do not shed light on the purpose for which the College sought legal advice. Put otherwise, I do not accept that an unfair investigation and dislike by the College employee are evidence that the College knowingly requested legal advice in order to breach the *Human Rights Code* or its obligations to protect the applicant from bullying and harassment. These allegations are simply too far removed from the central question to "give colour" to the applicant's argument.

[52] The remainder of the applicant's submissions consist of speculation about the possible content of solicitor-client communications relating to the investigation and Appeal. They have no basis in evidence put forward by the applicant, and they do not assist the applicant in establishing a *prima facie* case.[42] For these reasons, I find that the applicant has failed to establish that the crime-fraud exception applies.

Conclusion – production order

[53] For the reasons above, I do not find it necessary to exercise my authority, under s. 44, to order the Ministry to produce unredacted copies of the s. 14 information for my review.

Solicitor-Client Privilege

[54] Solicitor-client privilege protects confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice, opinion, or analysis.[43] For information to be protected by solicitor-client privilege it must be:

- a communication between solicitor and client (or their agent);
- that entails the seeking or providing of legal advice; and
- that is intended by the solicitor and client to be confidential.[44]

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[42] It is well-established that speculation cannot establish a *prima facie* case. See for example Order F21-50, 2021 BCIPC 58 (CanLII) at para 56 in which the adjudicator refused to accept that speculation amounted to a *prima facie* case in the context of the crime-fraud exception.
[43] *College of Physicians of B.C. v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para 26.
[44] *Solosky supra* note 32 at page 837, and *R. v B.*, 1995 CanLII 2007 (BC SC) [*R v B*] at para 22.

[55] Not every communication between client and solicitor is protected by solicitor-client privilege. However, if the conditions set out above are satisfied, then solicitor-client privilege applies.[45] In this regard, solicitor-client privilege includes all communications made with a view to obtaining legal advice, whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem.[46]

[56] In addition, solicitor-client privilege extends to more than just communications between lawyer and client. It includes communications that are "part of the continuum of information exchanged"[47] between the client and the lawyer to obtain or provide the legal advice. The "continuum of communications" involves the necessary exchange of information between solicitor and client for the purpose of obtaining and providing legal advice such as "history and background from a client" and communications to clarify or refine the issues or facts.[48] It also covers communications at the other end of the continuum, after the client receives the legal advice, such as internal client communications about the legal advice and its implications.[49]

The College's Evidence

[57] Having dismissed the applicant's request for a production order, I now turn to the merits of the s. 14 issue.

[58] I accept the College's sworn evidence in support of its assertion of solicitor-client privilege. I am satisfied that the three lawyers have direct knowledge of the nature and content of the communications reflected in the records and a strong understanding of the scope and purpose of the s. 14 solicitor-client privilege exemption. I also accept that the Manager has direct evidence about the identities of the senders and recipients of the communications and the College's exercise of discretion. Finally, the lawyers' evidence is consistent with one another, with the information in the tables of records, and where available, with the information in the records.[50] Furthermore,

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[45] *R. v B. supra* note 44 at para 22; *Solosky supra* note 32 at page 13; R. v McClure, 2001 SCC 14 [*McClure*] at para 36, *Festing v Canada (Attorney General)*, 2001 BCCA 612 at para 92.
[46] *Descôteaux supra* note 28 at 892-893.
[47] *Huang supra* note 31 at para 83. See also *Camp Development supra* note 30 at paras 40-46.
[48] *Camp Development ibid* at para 40.
[49] *Bilfinger Berger (Canada) Inc. v Greater Vancouver Water District,* 2013 BCSC 1893 [*Bilfinger*] at paras 22-24.
[50] There are two exceptions to this consistency. The Lawyer described the record at pages 141-143 as an internal College communication attaching legal advice from the Primary Lawyer, while the Primary Lawyer described it as a communication between himself and the College. The reverse is true of the record at pages 170-174. I attribute this difference to the challenge of classifying email chains that involve both communications from lawyers and internal communications between College representatives. Where the evidence of the affiants differed on this point, I preferred the evidence of Primary Lawyer who was directly involved in both communications.

while the applicant challenges the substance of the College's assertion of solicitor-client privilege (which I will address below), she does not challenge the evidence provided by the College's affiants.

[59] For these reasons, I accept the College's sworn evidence in support of its assertion of solicitor-client privilege.

The Records

[60] Based on the evidence of the Lawyer, the Primary Lawyer, the Association Lawyer, and the Manager, I find that the s. 14 information can be broken down into three categories:

- Communications between lawyers and College representatives
- Communications between lawyers, College representatives, and the College's insurer
- Communications amongst College representatives (and in some cases the College's insurer)

I will address the parties' evidence and argument as it relates to each category.

Communications between lawyers and College representatives

[61] The Lawyer and the Primary Lawyer describe some of the withheld information as communications between themselves and the College. For the reasons below, I find that these communications satisfy all three steps of the test for solicitor-client privilege.

[62] **Step 1:** The Lawyer states that she and the Primary Lawyer acted as legal counsel for the College and provided the College with legal advice in connection with all the withheld communications at issue except those involving the employer's association. Based on the Lawyer's evidence, I accept that there was a solicitor-client relationship between the Lawyer and the Primary Lawyer and the College for the purposes of the communications described above.

[63] **Step 2:** The Lawyer states that these communications were for the purposes of seeking, formulating, or providing legal advice or related legal services,[51] and that they include an email communication in which the College requested legal advice from the Primary Lawyer on a document that was attached to the communication.[52] The Primary Lawyer's evidence echoes that of the Lawyer.

[51] Affidavit 1 of Lawyer at para 5(a) referencing records at pages 94-96, 186-188, 207-213, 226-233, 234-239, 240-245, and at para 5(c) referencing records at pages 141-143, 184-185, 189-190 and 219-223, 224-225.
[52] Affidavit 2 of Lawyer at para 5.

[64] It is well-established that communications between solicitor and client for the purpose of seeking, formulating, or providing legal advice are privileged.[53] Equally well-established is that information that would reveal that legal advice is also privileged.[54] Relying on the OIPC's extensive body of case law, I have no difficulty finding that these communications entail the seeking or providing of legal advice.

[65] As for the attachment, an attachment may be privileged on its own or as an integral part of the privileged communication to which it is attached because it would reveal that communication either directly or by inference.[55] While there is no evidence that the attachment is privileged on its own, it is attached to a communication the Lawyer describes as (and I accept is) a request for legal advice.

[66] Given the clear connection between the attachment and the request for legal advice, in my view revealing the attachment would risk allowing an accurate inference to be made about the content of the request. Accordingly, I find that the attachment is protected by the same privilege as the request for legal advice to which it is attached because it is an essential part of, and if disclosed, would risk revealing, the communications to which it is attached.[56] Accordingly, I find that the attachment also satisfies the second step of the test for solicitor-client privilege.

[67] **Step 3:** The Lawyer and the Primary Lawyer state that the records are themselves confidential communications or attach or discuss confidential communications between the College and legal counsel.

[68] I note that the communications routinely involved multiple lawyers and employees of the law firm. The involvement of multiple members of the law firm does not detract from the confidentiality of the communication. Canadian Courts have long recognized that lawyers, their staff, and other firm members working together on a file may share privileged information amongst themselves without vitiating confidentiality.[57] Relying on these principles, I find that the involvement of multiple lawyers and employees of the law firm has no bearing on the confidentiality of the communications.

[69] I accept the sworn evidence of the Lawyer and Primary Lawyer that all the communications were intended by both the solicitors and the clients to be

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[53] Order F17-31, 2017 BCIPC 33 (CanLII); Order F23-33, 2023 BCIPC 39 (CanLII) at paras 29 and 30; Order F23-43, 2023 BCIPC 51 (CanLII); and Order F19-41, 2019 BCIPC 46 (CanLII).
[54] Order F23-43, 2023 BCIPC 51 (CanLII) at para 25.
[55] Order F18-19, 2018 BCIPC 22 (CanLII) at paras 36-44.
[56] The information is described in part of paragraph A, above.
[57] *Shuttleworth v Eberts et. al*., 2011 ONSC 6106 at paras 67 and 70-71 and *Weary v Ramos*, 2005 ABQB 750 at para 9.

confidential. Based on this evidence, I find that these communications satisfy the third step of the test for solicitor-client privilege.

> *Communications between lawyers, College representatives, and the College's insurer*

[70] The Lawyer and the Primary Lawyer state that other communications involve the College, the Primary Lawyer, and the College's insurer, which is The University, College, and Institute Protection Program (UCIPP or the insurer).[58] Again, I find that these communications satisfy all three steps of the test for solicitor-client privilege.

[71] **Step 1:** The Lawyer and the Primary Lawyer depose that some of the communications were for the purposes of engaging legal counsel to represent the College in respect of the Human Rights Complaint while others were for purposes related to seeking and providing legal advice related to the Human Rights Complaint.[59] Also, it is clear from the records that the College was communicating with a UCIPP claims investigator regarding the Human Rights Complaint[60] and that College representatives were keeping the insurer informed about the Human Rights Complaint.[61]

[72] When a lawyer is hired by an insured and an insurer to represent the insured, the lawyer is regarded as being jointly retained to represent both parties.[62] In *Corp. of the District of North Vancouver v BC (The Information and Privacy Commissioner),* the BC Supreme Court described the tri-partite relationship as follows:

> [The insured], [insurer] and solicitors are in a relationship by virtue of the special responsibilities and duties created when insurers retain solicitors to represent and advise insureds, and then necessarily deal with those solicitors in certain aspects as principal, in others as agent for the insured. A solicitor has in effect two clients: the insurer and the insured. Information or communications may well be passed through one to the other.[63]

[73] Based on the College's evidence, I find that the College made a claim to the insurer in respect of the Human Rights Complaint, and that the insurer was involved in hiring legal counsel in respect of the Complaint. Accordingly, I am satisfied that the communications between the College, its insurer, and the

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[58] Primary Lawyer's table of records.
[59] Affidavit 1 of Lawyer at para 5(c) and table of records of Primary Lawyer referencing records at pages 170-174, 184-185, 186-188, 189-190 and 219-223.
[60] See for example record at pages 141-143.
[61] Records pages 141-143.
[62] *Chersinoff v Allstate Insurance Co*. 1968 CanLII 671 (BC SC).
[63] 1996 CanLII 521 (BC SC) at para 22.

Primary Lawyer fall within the tri-partite relationship and accordingly are solicitor-client communications.

[74] **Step 2:** As above, I find that the communications the Lawyer describes as related to seeking and providing legal advice satisfy the second step of the test for privilege.[64]

[75] However, the communications the lawyers describe as having taken place for the purpose of engaging legal counsel raise the question of when the solicitor-client relationship begins, and whether communications that relate to engaging a solicitor, rather than a legal matter, are privileged. In *Descoteaux v Mierzwinski* [*Descoteaux*], the Supreme Court of Canada addressed both issues directly:

> A lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established."[65]

[76] Consistent with the Supreme Court's ruling, both the OIPC and the BC courts have held that solicitor-client communications that set out the terms of the solicitor client relationship relate directly to the seeking, formulating, or giving of legal advice and are therefore privileged.[66] These authorities make clear that communications whose purpose it is to engage a lawyer fall within the solicitor-client framework. Relying on these authorities, I find that these communications also satisfy the second step of the test for solicitor-client privilege.

[77] **Step 3:** Considering the special tri-partite relationship, the involvement of the insurer in these communications does not detract from the confidentiality of these communications. Again, I accept the Lawyer and the Primary Lawyer's sworn evidence that all the communications were intended by them and their clients to be confidential, so I find that these communications satisfy the third step of the test for solicitor-client privilege.

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[64] Order F17-31, 2017 BCIPC 33 (CanLII); Order F23-33, 2023 BCIPC 39 (CanLII) at paras 29 and 30; Order F23-43, 2023 BCIPC 51 (CanLII); and Order F19-41, 2019 BCIPC 46 (CanLII).
[65] *Descôteaux supra* note 28 at 892-893.
[66] Order F15-15, 2015 BCIPC 16 (CanLII) at para 17.

Communications amongst College representatives (and in some cases the College's insurer)

[78] Finally, the Lawyer, the Primary Lawyer and the Association Lawyer describe some of the communications as internal communications amongst College personnel. The applicant challenges the College's assertion of privilege over these communications on the basis that communications between the College's human resources personnel should not attract solicitor client privilege because there are no lawyers involved. The applicant asserts that one individual involved in these communications was not working for the College at the time. I understand this to be an argument that privilege does not apply because an outsider to the solicitor-client relationship was involved. I will address these arguments and the College's responses to them under steps 2 and 3, respectively. However, for the reasons below, I find that these communications satisfy all three steps of the test for solicitor-client privilege.

[79] **Step 1:** As detailed below, all but one of these communications relate to legal advice from the Primary Lawyer and the Association Lawyer. I have already determined that there is a solicitor-client relationship between the Lawyer and Primary Lawyer and the College, and I am satisfied that this finding applies to the communications at issue.

[80] The remaining record relates to the legal advice of the Association Lawyer. The Association Lawyer states that the College is a member of the employers' association, and that a regular aspect of her role is providing legal advice to members of the employers' association. She also states that in the communication at issue she did provide legal advice to the College. Based on this evidence, I am satisfied, that there was also solicitor-client relationship between the Association Lawyer and the College for the purpose the communication involving the employers' association.

[81] **Step 2:** The Lawyer and the Primary Lawyer state that most of the internal communications relating to their legal advice are communications amongst members of the College's human resources department and management. They describe the withheld information as communications discussing legal advice provided by the Primary Lawyer, attaching communications with the Primary Lawyer,[67] and discussing materials compiled or to be compiled by the College for the purposes of seeking legal advice from the Lawyer or Primary Lawyer.[68] The Association Lawyer deposes that the record in which she was involved contains

[67] Affidavit 1 of the Lawyer at para 5(b) referencing records at pages 55-61, 170-174 and 214-218.
[68] Affidavit 1 of the Lawyer at para 5(d) referencing records at pages 123-132, 167-169, and 745-752.

legal advice she prepared for the College and a covering email that, if disclosed would reveal her legal advice.[69]

[82] While the applicant is correct that these communications do not involve lawyers, this fact does not mean that the communications are not subject to privilege. Privilege attaches to internal communications that do not involve lawyers where those communications discuss, would reveal, or are necessary to obtaining legal advice because these kinds of communications fall within the protected continuum of privileged communications. The two lawyers describe the communications as internal client communications that discuss a solicitor's advice and the compilation of materials for the purpose of seeking legal advice. Based on the College's direct evidence about the nature of these communications, I find that these kinds of communications satisfy step 2 of the test because they fall squarely within the protected continuum of communications.[70]

[83] The Lawyer and Primary Lawyer describe another record as a communication about an anticipated telephone call between the Primary Lawyer and the College for the purpose of seeking legal advice.[71] I also find that this information satisfies the second step of the test for solicitor-client privilege, though for different reasons. Consistent with the Supreme Court of Canada's comments in *Descoteaux* that privilege applies to all information, including "matters of an administrative nature," that a person must provide in order to obtain legal advice, previous OIPC orders have held that communications regarding scheduling and meetings arrangements are covered by privilege.[72] I accept that a communication about a telephone call whose purpose was to seek legal advice was necessary to the seeking of the legal advice itself. Accordingly, I find that this information also satisfies the second step of the test for solicitor-client privilege.

[84] Finally, the Primary Lawyer describes one record as an internal communication about a question to be posed to legal counsel related to preparation for litigation of the Human Rights Complaint.[73] Internal client communications about a question to be posed to legal counsel are not privileged unless the question is in fact asked. The reason is that until the question is

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[69] Affidavit of Association Lawyer at para 7.
[70] *Camp Development supra* note 30 at para 40.
[71] Affidavit 1 of Lawyer at para 5(e) referencing records at pages 767-769.
[72] Order F21-23, 2021 BCIPC 28 (CanLII) at para 46; Order F20-24, 2020 BCIPC 28 (CanLII) at paras 30-31; Order F19-01, 2019 BCIPC 1 (CanLII) at para 20; *Legal Services Society v British Columbia (Information and Privacy Commissioner)*, 1996 CanLII 1780 (BC SC) at para 16; Order F15-15, 2015 BCIPC 16 at para 17.
[73] Affidavit of Primary Lawyer, Table of Records, document no. 20, referencing records page 1305.

asked, it is neither itself a solicitor-client communication, nor could it reveal any such communication. In this case, the College has not asserted that it ever asked the question, and accordingly, I find that this information does not satisfy the second step of the test for legal advice privilege.

[85] **Step 3:** The Lawyer, the Primary Lawyer, and the Association Lawyer all state that the records are themselves confidential communications or attach or discuss confidential communications between the College and legal counsel.

[86] In his table of records, the Primary Lawyer describes three records that involve the person the applicant says was no longer working for the College.[74] The communications in these three records took place from July of 2019 to January of 2020. The Primary Lawyer states that the person was a Vice President at the College at the time of each of the three communications. The applicant says only that the person stopped working for the College in 2020. Given the Primary Lawyer's specific evidence, and the fact that the applicant does not say when exactly the person left the College, I find that the person was a College employee at the time of the communications. Accordingly, I find that the person's involvement in the communications has no bearing on their confidentiality.

[87] I accept the lawyers' sworn evidence, and I find that these communications also satisfy the third step of the test for solicitor-client privilege.

The "Minor Issue"

[88] Finally, the applicant argues that there is no basis for the College's assertion of privilege over discussions relating to what she describes as a minor issue. For the reasons that follow, I do not accept this argument.

[89] Solicitor-client privilege is a class-based privilege. It does not involve a balancing of interests or a weighing of the harm that might result from disclosure.[75] If the conditions for privilege are met, there is a presumption of non-disclosure subject only to limited exceptions.[76] There is no exception for "minor issues." As a result, whether a matter under discussion is minor does not affect the application of solicitor-client privilege.

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[74] Description found in table of records attached to affidavit of Primary Lawyer.
[75] *McClure supra* note 45 at para 35; *R. v Gruenke*, 1991 CanLII 40 (SCC) at para 26; *R. v Goodis*, 2006 SCC 31 at paras 15-17; *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at para 75.
[76] *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52.

Conclusion

[90] For the reasons given, I find that apart from the information relating to the internal communication about the question,[77] the College has established that the information it withheld under s. 14 is protected by solicitor-client privilege.

Litigation Privilege

[91] There was significant overlap between the College's application of solicitor-client privilege and litigation privilege to the records in dispute. As a result of the overlap, only two pieces of information remain in dispute under litigation privilege – the "question information" that I found was not subject to solicitor-client privilege and one other record over which the College did not assert solicitor-client privilege.[78] I will only decide if litigation privilege applies to these two records.

[92] Litigation privilege protects a party's ability to effectively conduct litigation. Its purpose is to ensure the efficacy of the adversarial process.[79] It does so by creating a protected area in which parties to pending or anticipated litigation are free to investigate, develop, and prepare their positions in private, without adversarial interference into their thoughts or work product and without fear of premature disclosure.[80]

[93] To succeed in a claim of litigation privilege the party invoking it must establish that:

> (1) Litigation was ongoing or was in reasonable prospect at the time the document was created; and
>
> (2) The dominant purpose of creating the document was to prepare or aid in the conduct of that litigation.[81]

[94] The threshold for determining whether litigation is "in reasonable prospect" is a low one and it does not require certainty.[82] The essential question is would a reasonable person, being aware of the circumstances, conclude that the claim will not likely be resolved without litigation?[83]

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[77] Affidavit of Primary Lawyer, table of records, document no. 20, referencing page 1305 of the records.
[78] The information that remains in dispute is found at pages 673-679 and 1305 of the records.
[79] *Blank v Canada (Minister of Justice*), 2006 SCC 39 [*Blank*] para 27.
[80] *Blank ibid* at para 27; *Raj v Khosravi*, 2015 BCCA 49 [*Khosravi*] para 7.
[81] *Gichuru supra* note 13 para 32; *Khosavri ibid* at paras 12 and 20.
[82] *Khosavri, supra* note 80 at para 10.
[83] *Ibid* at para 11 citing *Sauvé v ICBC*, 2010 BCSC 763 at para 30.

[95] There is no absolute rule for determining whether litigation was the "dominant purpose" for the document's production. A finding of dominant purpose is a factual determination that must be made based on all the circumstances and the context in which the document was produced.[84]

> *Was litigation ongoing or reasonably contemplated at the time the records were created?*

[96] Both the Lawyer and the Primary Lawyer state that both communications relate to the litigation of the Human Rights Complaint. The applicant filed the Human Rights Complaint with the B.C. Human Rights Tribunal on August 26, 2020,[85] and it was received by the College by, at the latest, March 22, 2021.[86] The Primary Lawyer discusses both records in his table of records. He states that the first was an email chain exchanged between March 22, 2021 and March 23, 2021, and the other was an email message sent on May 12, 2021. Both parties agree that the Human Rights Complaint remained outstanding as of the commencement of the OIPC inquiry.[87]

[97] Based on the foregoing, I find that the email chains were created after the applicant commenced the Human Rights Complaint and while the litigation was ongoing. I am satisfied that litigation was ongoing at the time the record was created.

> *Was the dominant purpose of creating the document to prepare or aid in the conduct of that litigation?*

[98] The Lawyer and Primary Lawyer state that the dominant purpose of creating both email chains was to prepare for litigation of the Human Rights Complaint. In addition, the email chain dated March 22 and 23, 2021 is only partially severed and the disclosed portion of that email chain shows that this chain relates to the notice of complaint that initiated the Human Rights Complaint. On the face of the email chain, there is no question that, but for the litigation, the email chain would not have been created. As the May 12, 2021, email is fully redacted, there is no evidence to corroborate the lawyers' evidence.

[99] However, in both cases, I accept the lawyers' direct evidence that the dominant purpose of the emails was to prepare for litigation of the applicant's Human Rights Complaint.

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[84] *Ibid* at para 17.

Conclusion

[100] For the reasons above, I find that the College has established that the remaining records are protected by litigation privilege, and they may be withheld under s. 14.

SECTION 13 - ADVICE AND RECOMMENDATIONS

[101] Section 13(1) allows a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body. The purpose of s. 13(1) is to prevent the harm that would occur if a public body's deliberative process was exposed to public scrutiny.[88]

[102] The College withheld information in several records under both ss. 13 and 14. I will consider the application of s. 13 only to the information that I have not already found that the College is authorized to withhold under s. 14. The information in dispute under s. 13(1) relates primarily to the Bullying and Harassment Complaint and is found in email communications.

[103] The test under s. 13 is well-established, and I will apply it below.

Section 13(1) – Would disclosure reveal advice or recommendations

[104] First, I must determine whether disclosing the information at issue would reveal advice or recommendations developed by or for a public body under s. 13(1).

[105] The information the College withheld under s. 13(1) is found in email communications amongst College representatives. These email communications reveal extensive discussion and consultation amongst representatives of the College concerning various matters related to the applicant's employment.[89] I am satisfied that all the information the College withheld under s. 13(1) was developed by and for the College. Accordingly, the remaining issue is whether the information reveals advice or recommendations within the meaning of s. 13(1).

[106] "Recommendations" involve "a suggested course of action that will ultimately be accepted or rejected by the person being advised."[90]

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[88] *Insurance Corporation of British Columbia v Automotive Retailers Association*, 2013 BCSC 2025 at para 52.
[89] In limited instances the records relate to matters other than the applicant's employment.
[90] *John Doe v Ontario (Finance),* 2014 SCC 36 [*John Doe*] at para 24.

[107] The term "advice" has a broader meaning than the term "recommendations,"[91] and includes "an opinion that involves exercising judgment and skill to weigh the significance of matters of fact;" [92] "expert opinion on matters of fact on which a public body must make a decision for future action;" [93] and "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."[94]

[108] Section 13(1) applies not only when disclosure of the information would directly reveal advice or recommendations, but also when it would allow accurate inferences about the advice or recommendations.[95]

The College's Submission

[109] The College describes the information withheld under s. 13(1) as internal advice and recommendations developed by the College for the purposes of addressing various matters related to the applicant's employment or the employment of other individual employees of the College. Through the table of records that forms part of the Manager's affidavit, the Manager provides a brief explanation of the basis for each redaction under s. 13. I will address the Manager's explanations in my analysis below.

The Applicant's Submission

[110] The applicant argues that the College misinterpreted and overused s. 13(1). In support of this assertion, she states that overuse of s. 13(1) is notorious and well-documented among public officials. She also references statements that she attributes to the Information and Privacy Commissioner (Commissioner) that s. 13(1) has been interpreted in a manner that has eroded the public's right of access and expanded over time to prevent the disclosure of too many records. Addressing the specific records at issue, she reviews each redaction and requests that someone with access to unredacted versions of the records ensure that s. 13(1) has been properly applied.

Findings and Analysis

[111] In considering the College's application of s. 13(1), I considered the applicant's assertion that the College overused s. 13(1). However, my analysis

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[91] *John Doe ibid* at para 23.
[92] *College supra* note 43 at para 113; Order No. F21-15, 2021 BCIPC 19 (CanLII) at para 59.
[93] *College ibid* at para 113.
[94] *Provincial Health Services Authority v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 [*PHSA*] at para 94. See also *College supra* note 43 at para 110.
[95] See for example *John Doe supra* note 90 at para 24; Order 02-38, 2002 CanLII 42472 (BCIPC), Order F10-15, 2010 BCIPC 24 (CanLII) and Order F21-15, 2021 BCIPC 19 (CanLII).

was limited to the College's conduct in this case. While the applicant made several assertions about the application of s. 13(1) by public bodies in general, what is relevant is the College's conduct in this case, not the conduct of public bodies in general.

[112] **Suggestions:** Much of the information the College withheld under s. 13(1) is suggestions about the College's interactions with the applicant, such as next steps, how to handle specific issues and communication strategies.[96] It is clear on the face of the records that these suggestions may be accepted or rejected by the recipients. In some instances, the authors expressly request input, making clear that the suggestion may be accepted or rejected. In others, it is clear from the context provided by the surrounding information and discussions that the suggestion could be (and often was) accepted or rejected by the recipient. I find that this information is recommendations within the meaning of s. 13(1).

[113] **Questions that Embed Suggestions:** The College also withheld questions which embed the author's suggested next steps.[97] While framed as questions rather than recommendations, it is clear from the records that the questions are simply another means of suggesting a specific course of action. In addition, it is clear from the question format that the suggestions could be accepted or rejected by the recipient. I find that this information also is recommendations within the meaning of s. 13(1).

[114] **Opinions:** The College also withheld the opinions of its human resources personnel about ongoing matters involving the applicant under s. 13(1).[98] It is clear from both the opinions themselves and the surrounding context that the authors were providing their opinions based on the specific circumstances before them and their knowledge and expertise more generally. I find that the opinion information is advice within the meaning of s. 13(1).

[115] **Background Information:** Much of the information discussed above is accompanied by specific background facts on which the author offers their advice or recommendations.[99] The structure is: "here is the situation, this is what I recommend, or this is my opinion." It is clear on the face of the records that the

[96] Records at pages 74, 119, 179, 180, 254, 296, 297, 311, 320, 331, 337, 347, 348, 350, 357, 363, 366, 369, 408, 411, 423 (redaction 2, 3, 4), 428, 429 (redaction 1 and 3), 430, 431, 433, 437 (redaction 1 and 2), 441, 450, 463, 755, 900 (contains both recommendations and advice), 928, 930, 931, 968, 996, 1016, 1073, 1128, 1163,1164, 1232, 1233, 1243, 1244, 1245, 1246, 1308.
[97] Records at pages 179-180 (last para on page 179 over to page 180), 320 (redaction 2), 321 (redaction 2), 354 (redaction 2), 433 (redaction 1), 437 (redaction 2), 441 (redaction 2), 354 (redaction 2), 1016 (redaction 2), 1017 (redaction 2), 1605.
[98] Records at pages 179-180 (last para on page 179 over to page 180), 320 (redaction 2), 321 (redaction 2), 354 (redaction 2), 433 (redaction 1), 437 (redaction 2), 441 (redaction 2), 354 (redaction 2), 900 (contains both advice and recommendations), 1016 (redaction 2), 1017 (redaction 2), 1605.
[99] Records at pages 74, 179, 254, 296, 331, 363, 463, 767, and 1073.

background information was selected using the authors' expertise and compiled for the purpose of providing the explanations necessary for the recipient to evaluate the recommendation or advice and decide. For this reason, I find that this kind of information falls within the broader definition of the term "advice" discussed above.[100] Furthermore, because of the information is so intertwined with and integral to the recommendations to which it relates, it cannot be severed without revealing the recommendations. For both reasons, I find that s. 13(1) applies to this kind of information.

[116] **Other Information that would Reveal Advice and Recommendations:** The College also withheld information that, while not itself advice or recommendations, I find would, if disclosed, reveal, or allow accurate inferences about advice or recommendations found in the records.[101] In one case, this information is found in communications where a College representative tells a coworker about the advice they intend to give.[102] In another it is found in a College representative's recitation of the advice another gave.[103] While not itself advice, if disclosed, this information would clearly reveal the advice at issue. As set out above, s. 13(1) applies not only to advice and recommendations, but also when disclosure of the information would directly reveal advice or recommendations,[104] and for this reason, I find that this information too, falls under s. 13(1).

[117] **Final Decision:** However, two pieces of information the College withheld are final decisions.[105] While one is a specific answer, and the other is a policy position, in both cases, the information is the last communication in the email chain. It comes from a person in a position of authority and ends the deliberative process by deciding the issue under deliberation. Unlike the other information the College withheld under s. 13(1), this information is not part of an ongoing deliberative process, but the end of it.

[118] The information is clearly not advice or a recommendation because it is clear from the context that the information cannot be rejected by the recipient. In addition, this information does not fit within the purpose of s. 13(1), which is intended to protect a public body's deliberative process, not the outcome of those processes. For these reasons, I find that s. 13(1) does not apply to this information.

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[100] *PHSA supra* note 94 at para 94. See also *College supra* note 43 at para 110.
[101] Records at pages 1 and 419.
[102] Records at page 1.
[103] Records at page 419.
[104] See for example *John Doe supra* note 90 at para 24; Order 02-38, 2002 CanLII 42472 (BCIPC), Order F10-15, 2010 BCIPC 24 (CanLII) and Order F21-15, 2021 BCIPC 19 (CanLII).
[105] Records at pages 350 (redaction 1), and 354 (redaction 1).

[119] For the reasons above, I find that s. 13(1) applies to all the information the College withheld under s. 13 except the two final decisions.

Section 13(2) – Exceptions to Disclosure

[120] The next step is to decide whether the information that I have found is advice or recommendations under s. 13(1), falls into any of the categories in s. 13(2). If s. 13(2) applies to any of the information, that information cannot be withheld under s. 13(1).

[121] The College asserts that none of the exceptions in s. 13(2) apply. Specifically, it submits that none of the information is "factual material" within the meaning of s. 13(2)(a) because any information of a factual nature forms part or is intertwined with advice and recommendations protected by s. 13(1). The applicant does not address s. 13(2) in her submissions.

[122] I find that s. 13(2)(a) does not apply to the information at issue. The term "factual material" is not defined in FIPPA. However, in distinguishing it from "factual information" which may be withheld under s. 13(1), the courts have interpreted "factual material" to mean "source materials" or "background facts in isolation" that are not necessary to the advice provided.[106] Thus where facts are compiled and selected by an expert as an integral component of their advice, it is not "factual material" within the meaning of s. 13(2)(a).[107]

[123] As discussed above, the background information at issue was clearly compiled for the purpose of providing the explanations necessary for the recipient to evaluate the recommendation or advice and make a decision. As a result, it not the kind of distinct source material or isolated background facts that courts have found is "factual material." Accordingly, I am satisfied that the background information at issue is not "factual material" under s. 13(2)(a).

[124] Having examined the other categories in s. 13(2), I find that they do not apply.

Section 13(3) – In Existence for 10 or More Years

[125] The third step is to consider whether the information has been in existence for more than 10 years under s. 13(3). Information that has been in existence for more than 10 years cannot be withheld under s. 13(1).

[126] While some of the information in the responsive records has been in existence for more than 10 years, the information withheld under s. 13(1) has not. I find that s. 13(3) does not apply.

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[106] *PHSA supra* note 94 at para 94.
[107] *PHSA supra* note 94 at para 94.

The College's Exercise of Discretion

[127] Finally, s. 13(1) is a discretionary provision. As a final step, I will consider the College's exercise of discretion over the information it withheld under s. 13(1).

[128] As the language of s. 13(1) uses the word "may," s. 13(1) is a discretionary exception. Accordingly, the College is required to exercise discretion in considering whether to disclose information to which s. 13(1) applies. However, in considering the College's exercise of discretion, it is not my role to substitute the decision I would have reached for that of the College, but only to ensure that the College has exercised its discretion and has not done so in bad faith or based on extraneous or irrelevant grounds. If I find the College has not properly exercised its discretion, I have the power to order the College to do so.

[129] The applicant argues that the College's exercise of its discretion under s. 13(1) must be interpreted in accordance with the purposes of FIPPA in s. 2 and weighed against s. 25 (disclosure in the public interest).

[130] The College says that it properly exercised its discretion. The Manager provided evidence in support of the College's position. According to the Manager, in exercising its discretion to withhold the information under s. 13, the College considered various factors including:

- the purposes of FIPPA and section 13;
- case law concerning the scope, interpretation, and purposes of section 13;
- the sensitivity of the disputed records including that some of them relate to third parties or contested matters still ongoing between the College and the applicant;
- the impact that disclosure would have on the College's internal deliberative processes; and
- the fact that the records essentially relate to private employment-related issues and there is no public interest served by disclosure.

[131] Based on the Manager's evidence, I find that the factors the College considered in exercising its discretion were appropriate. In so finding, I acknowledge that the applicant and the College disagree about the value of the public interest served by disclosing the records. However, the consideration referenced by the College – that the records relate to a private employment related matter – is a relevant consideration and there is no evidence before me to suggest that the College's consideration in this respect was in bad faith. Accordingly, I am not persuaded that the College erred in its exercise of discretion under s. 13.

Conclusion – s. 13

[132] For the foregoing reasons, I find that apart from the two final decisions,[108] the College is authorized to withhold the records that it withheld under s. 13(1).

SECTION 22 – UNREASONABLE INVASION OF THIRD-PARTY PERSONAL PRIVACY

[133] Section 22 of FIPPA requires a public body to refuse to disclose personal information that would be an unreasonable invasion of a third party's personal privacy.

[134] While the applicant states that she does not intend to force divulgence of any truly private and confidential third party personal information, she questions the legitimacy of several of the College's specific redactions. She also notes that some of the withheld information appears to be about her, and questions how its disclosure could infringe a third-party's privacy.

[135] As with s. 13(1), in the analysis above, I will consider each redaction made by the College to assess whether s. 22(1) applies. I will address the applicant's comments about her own personal information under s. 22(2).

[136] The College's submissions relate to individual subsections of s. 22, and I will address them below.

[137] The information in dispute under s. 22(1) arises in the context of various matters related to the applicant's employment including the Accommodation Request, the Bullying and Harassment Complaint, and the investigation into that complaint. It is found primarily in email communications. However, the College also relied on s. 22(1) to withhold one piece of information from the investigation report into the Bullying and Harassment Complaint.

Section 22(1) – Personal Information

[138] As s. 22(1) only applies to personal information, the first step in the s. 22(1) analysis is to determine whether the information in dispute is "personal information" within the meaning of FIPPA.

[139] "Personal information" is defined in FIPPA as "recorded information about an identifiable individual other than contact information." Information is "about an identifiable individual" when it is "reasonably capable of identifying an individual, either alone or when combined with other available sources of information."[109]

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[108] The information the College is not authorized to withhold is found at pages 350 (redaction 1), and 354 (redaction 1) of the Records.
[109] Order F19-13, 2019 BCIPC 15 at para 16, citing Order F18-11, 2018 BCIPC 14 at para 32.

[140] 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."[110] Whether information is "contact information" depends on the context in which it appears.[111] The key question is whether the information, in the context in which it appears in the records, is used in the ordinary course of conducting the third party's business affairs.[112]

[141] In addition, s. 22(1) concerns third party personal privacy. Under FIPPA, a third party is "any person, group of persons or organization other than: (a) the person who made the request, or (b) a public body."[113]

[142] The information the College withheld under s. 22(1) can be grouped as follows:

- The name, initials, and other identifying information about the individual who was the subject of the investigation into applicant's bullying and harassment complaint, as well as information about that individual's participation in the investigation;
- Employee's views, complaints, and requests in relation to other workplace issues involving the applicant;
- A student complaint about the applicant;
- Medical conditions, medical accommodations, and medical leave;
- Employment-related information about third party employees such as workplace investigations into them (not involving the applicant), performance issues, discipline, course assignments, availability, retirement, and telephone numbers; and
- Employee personal appointments, personal obligations, and vacations.

[143] I find that some, but not all the withheld information is "personal information." All the withheld information is recorded information about identifiable third parties. In this regard, each piece of information relates to a specific individual who is named or identified by their initials in the record. As individual's names and initials are used regularly in the records, where individuals are identified by their initials, their full names can be easily deduced. Accordingly, it is all recorded information about third parties.

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[110] Schedule 1.
[111] Order F20-13, 2020 BCIPC 15 (CanLII) at para 42.
[112] Order F21-69, 2021 BCIPC 80 (CanLII) at para 42; Order F20-08, 2020 BCIPC 9 at para 52, Order F15-33, 2015 BCIPC 36 at para 31, Order F15-32, 2015 BCIPC 35 (CanLII) at para 15.
[113] Schedule 1 of FIPPA.

[144] However, some of the information falls into the "contact information" exemption and is, therefore, not personal information. The College withheld telephone numbers that employees provided in email discussions about accommodation, compensation, and course development.[114] It is clear from the context, that the matters under discussion relate to the affected employee's ordinary business responsibilities, and that they provided their telephone numbers to enable the recipients to contact them. Relying on the case law set out above, in this context, I find that the telephone numbers are contact information, and therefore not personal information within the meaning of s. 22(1). Accordingly, s. 22(1) does not apply to these telephone numbers.[115]

Section 22(4) – Circumstances where Disclosure is not an Unreasonable Invasion of a Third Party's Personal Privacy

[145] Section 22(4) sets out circumstances where disclosure is not an unreasonable invasion of a third party's personal privacy. If information falls into one of the enumerated circumstances, s. 22(1) does not apply and the public body must disclose the information.

[146] The College submits that it is clear on the face of the records that none of the categories listed in s. 22(4) apply to the withheld information.

[147] Having considered the factors listed under s. 22(4), I find that s. 22(4) does not apply.

Section 22(3) – Disclosure Presumed to be an Unreasonable Invasion of Third-Party Personal Privacy

[148] Section 22(3) lists circumstances where disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. The College argues that ss. 22(3)(a) and (d) apply.[116]

Section 22(3)(a) – medical, psychiatric, or psychological history

[149] Section 22(3)(a) creates a presumption that it is an unreasonable invasion of a third party's personal privacy to disclose personal information that relates to a medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation.

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[114] Records page 816, 883, and 1425.
[115] Records page 816, 883, and 1425.
[116] The College also references s. 22(3)(f) (third party finances) in its submissions. However, it does not explain how any of the withheld information relates to finances, and I was not able to identify any information to which s. 22(3)(f) could apply. For these reasons, I have not considered s. 22(3)(f) further.

[150] I find that some of the information to which the College has applied s. 22(3) relates to medical procedures and appointments,[117] medical conditions and diagnoses,[118] and medical leave.[119] This information is sufficiently detailed to provide at least some information about the nature of medical matters at issue. For these reasons, I find that the presumption in s. 22(3)(a) applies.

[151] However other information that that the College says falls under s. 22(3)(a) relates to the College's labour relations protocols,[120] an employee's participation in a workplace investigation,[121] and vacation.[122] On its face, there is no connection between any of this information and the subject matter of s. 22(3)(a), and the College has not explained any such connection. I find that s. 22(3)(a) does not apply to this information.

Section 22(3)(d) – employment and educational history

[152] Section 22(3)(d) creates a rebuttable presumption against disclosure where the personal information relates to the employment, occupational, or educational history of a third party.

[153] Past OIPC orders illustrate the kind of information captured by s. 22(3)(d). These orders reflect the language of the provision – for the presumption in s. 22(3)(d) to apply, the information must relate to a third parties' employment, occupation, or education, and be of the kind that it would ordinarily comprise part of the third party's employment, occupational or academic *history*, the scope of which is defined in the OIPC's case law.

[154] I find that the presumption in s. 22(3)(d) applies to some, but not all the information identified by the College as falling under this provision. I find s. 22(3)(d) applies to the following information:

[155] **Workplace Investigation:** The College asserts that s. 22(3)(d) applies to the name, initials, and other identifying information about the individual who was the subject of the investigation into the applicant's bullying and harassment complaint, as well as to information about that individual's participation in the investigation.[123] This kind of information is clearly employment related, and the

[117] Records pages 103-106, 133, 1304.
[118] Records pages 139, 733-734, 785-787, 812-814.
[119] Records pages 329-330, 339-340, 910-911, 1029-1030, 1134-1135, 1136-1137, 1140-1141, 1370-1372, 1373-1375, 1522-1523.
[120] Records pages 321-322.
[121] Records pages 99-102.
[122] Records pages 1606-1608.
[123] Records pages 5, 11, 92, 115, 119-120, 283, 357, 883, 1196, 1409, 1412, 1414-1415, 1426-1427, 1434, 1436, 1438, 1439.

fact that an employee was the subject of a workplace investigation is the kind of information that would, in my view, ordinarily comprise an employee's employment history. Furthermore, OIPC adjudicators have consistently held that information relating to a workplace investigation into an employee's conduct relates to that employee's employment history within the meaning of s. 22(3)(d).[124] I find that the presumption in s. 22(3)(d) applies to the workplace investigation information.

[156] The College also asserts that s. 22(3)(d) applies to information involving a workplace investigation into another employee.[125] For the reasons set out above, I also find the presumption in s. 22(3)(d) applies to this information.

[157] **Discipline and Performance Issues:** The College also sought to apply s. 22(3)(d) to information about an employee's disciplinary conduct,[126] and workplace performance.[127] This information relates directly to employment and is, in my view, the kind of information that would typically comprise an employee's employment history or record. Moreover, in past orders, OIPC adjudicators have found that s. 22(3)(d) applies to qualitative information about a third party's work performance such as disciplinary and performance issues.[128] For these reasons, I find that the presumption in s. 22(3)(d) applies to this information.

[158] **Administration of Employment:** The College also submits that s. 22(3)(d) applies to administrative information about third parties' employment such as retirement,[129] personal leave,[130] schedules and availability,[131] and workload.[132]

[159] In past orders, OIPC adjudicators have found s. 23(3)(d) to apply to personal information relating to the administration of a third party's employment, such as information relating to retirement,[133] personal leave,[134] and more general issues relating to scheduling, availability, and workload.[135] I make the same finding here.

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[124] See for example Order 01-53 at para 40; Order F08-04 at para 23; Order 2020 BCIPC 15 (CanLII) at para 54; and Order F21-17 at paras 19-22 and 25.
[125] Records pages 250-251.
[126] Records pages 99-102 and 1511-1513.
[127] Records pages 1397-1399, 1675-1678, 1721-1724, and 1725-1729.
[128] Order 01-53 2001 CanLII 21607 (BCIPC) at paras 32-33; Order F16-28, 2016 BCIPC 30 (CanLII) at para 94; and Order F23-56, 2023 BCIPC 65 (CanLII) at para 70.
[129] Records pages 41, 1397-1399, 1675-1678, 1721-1724, and 1725-1729.
[130] Records pages 339, 829.
[131] Records pages 645, 1296-1299.
[132] Records pages 1002-1004, 1031.
[133] Order F15-60, 2015 BCIPC 64 (CanLII) at para 33; and Order F11-02, 2011 BCIPC 2 (CanLII) at para 31.
[134] Order F20-20, 2020 BCIPC 23 (CanLII) at paras 130-131 and Order F23-13, 2023 BCIPC 15 (CanLII) at para 93.
[135] Order F23-56, 2023 BCIPC 65 (CanLII) at paras 78 and 79.

[160] **Educational History:** Finally, the College also asserts that s. 22(3)(d) applies to communications related to a student complaint about the applicant.[136] In past orders, OIPC adjudicators have held that information relating to the educational institution an individual attended, details about their programs and courses,[137] and details of an individual's academic activities and interactions with personnel at their post-secondary institutions[138] all form part of their educational history. The student complaint relates directly to the student's education. It reveals the post-secondary institution they attended, relates to a course the student took, and includes details about the student's interactions with a faculty member. Relying on the above case law, I find that the presumption in s. 22(3)(d) applies to this information.

[161] However, I find that s. 22(3)(d) does not apply to the remaining information identified by the College, either because it is not sufficiently related to a third party's employment, or it is not the kind of information that would ordinarily form part of an employee's employment history.

[162] **Vacations:** The College asserts that s. 22(3)(d) applies to information that discloses an employee's intention to take a vacation.[139] In my view, this information is not sufficiently connected to employment as to constitute employment history within the meaning of s. 22(3)(d). This finding is in line with past orders where OIPC adjudicators have come to the same conclusion.[140] I find that this information does not attract the presumption found in s. 22(3)(d).

[163] **Insignificant Gossip:** The College also submits that s. 22(3)(d) applies to an email discussion between two members of management about College employees.[141] The information is best described as work-related gossip. In my view, it is too insignificant to constitute employment *history.* I am not aware of any OIPC orders that have applied s. 22(3)(d) to this kind of information, and the College has not identified any. I find that it does not attract the presumption found in s. 22(3)(d).

[164] **Views:** Finally, the College states that s. 22(3)(d) applies to information about a third party's views about workplace issues involving the applicant.[142] The third party does not request any action from the College, and the issue does not

[136] Records pages 1441-1444.
[137] Order F10-11, 2010 BCIPC 18 at paras 17 and 19.
[138] Order F18-19, 2018 BCIPC 22 (CanLII) at para 53, Order F20-06, 2020 BCIPC 7 at para 36. and Order F23-60, 2023 BCIPC 70 (CanLII) at para 26.
[139] Records pages 400, 403.
[140] See for example Order F22-34, 2022 BCIPC 38 (CanLII) at para 204.
[141] Records page 345.
[142] Records pages 540, 934-935, 1368-1369, 1549-1550, and 1576-1577.

relate to the third party's employment. While the information is third party personal information, I find that it is not sufficiently related to the third party's employment as to be part of their employment history or record. It is more appropriately the applicant's employment information. As the presumption in s. 22(3)(d) does not apply to an applicant's personal information, I find that this information does not attract the presumption in s. 22(3)(d).

Summary – s. 22(3)

[165] In summary, I find that s. 22(3) applies to some but not all the information in dispute under s. 22(1). Having considered the other presumptions in s. 22(3), I find that no other presumptions apply.

Section 22(2) – All Relevant Circumstances

[166] Section 22(2) provides a non-exhaustive list of the circumstances that a public body must consider when determining whether disclosure is an unreasonable invasion of a third party's personal privacy. It is at this stage of the analysis that the presumptions under s. 22(3), may be rebutted.

[167] The College asserts that ss. 22(2)(e), (f), (g) and (h) weigh in favour of withholding information related to the workplace investigation into the applicant's bullying and harassment complaint, and that s. 22(2)(f) supports withholding information related to the medical information of third parties. I also considered s. 22(2)(c). Based on my review of the withheld information, I find that several other factors are relevant. These are the fact that some information at issue is also the applicant's personal information, the applicant's existing knowledge, and the sensitivity of the information. I will consider each of these factors below.

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

[168] Section 22(2)(h) requires a public body to consider whether disclosure of personal information may unfairly damage a third party's reputation.

[169] The College argues that it is reasonable to expect that disclosure (and possible publication) of information relating to the Bullying and Harassment Complaint would cause financial, reputational, or other harms, such as stress and anxiety to the individual who was the subject of the complaint. It also argues that this "very real risk"[143] of harm outweighs the fact that the applicant has prior knowledge of the information relating to the workplace investigation.

[170] Under s. 22(2)(h), past OIPC orders dealing with disclosure of allegations against third parties in the context of investigations have consistently held that

[143] College initial submission in first round of submissions at para 78.

the harm caused by disclosing personal information is unfair where the information amounts to unproven allegations against the individual affected and that individual did not have an opportunity to rebut the allegations in the context of an investigative process.[144]

[171] Also, relevant is the well-established principle that OIPC treats disclosure of information to an applicant as disclosure to the world. This principle is based on the fact that there are no restrictions in FIPPA prohibiting an applicant from disclosing information publicly, or otherwise limiting what use an applicant could make of information obtained through the OIPC's processes.[145] In referencing this principle, I wish to be clear that the applicant has not indicated that she would share or publish information she receives through the OIPC's processes. Nevertheless, in assessing the impacts of disclosure, I must nonetheless assume that disclosure is disclosure to the world.

[172] While the third party's name does not appear in the report, their name, initials, and other identifying information, as well as information about their participation in, and views and feelings about, the investigation appear throughout the records. Accordingly, I do find that disclosure of some information in dispute may allow a reader to identify the person who was the subject of the complaint.

[173] I do not, however, accept that disclosure of information that might connect the subject of the complaint to the investigation report would 'unfairly' damage their reputation. First, given the content of the investigation report, in my view, it is unlikely that identifying the subject of the complaint would harm their reputation. In addition, the OIPC's case law is quite clear that in the context of allegations that were subject to an investigation, reputational harm is only "unfair" where that individual does not have the opportunity to respond. The reasoning in this line of cases is applicable here. Even if revealing the personal information at issue might cause the subject of the complaint some reputational harm, as the report clearly sets out each party's position and details what did and did not occur, I am unable to find that any such harm that might result would be unfair.

[174] For the foregoing reasons, I am not persuaded that s. 22(2)(h) favours withholding the information relating to the bullying and harassment complaint.

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[144] Order F21-28, 2021 BCIPC 36 (CanLII) at para 124-126, Order F20-37, 2020 BCIPC 43 (CanLII) at paras 131-132; Order F17-01, 2017 BCIPC 1 (CanLII) at para 61; Order F16-50, 2016 BCIPC 55 (CanLII) at paras 52-54.
Order F16-50, 2016 BCIPC 55 (CanLII) at paras 52-54; Order 01-12, 2001 CanLII 21566 (BC IPC) at paras 38-39.

[145] Order F22-31, 2022 BCIPC 34 at para 80.

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

[175] 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.

[176] The College's argument under s. 22(2)(e) was identical its argument in respect of s. 22(2)(h) and is set out more fully above. In short, the College argues that it is reasonable to expect that disclosure of information relating to the investigation would result in financial and other harms such as stress and anxiety to the subject of the complaint.

[177] The College has not explained how disclosure of that individual's personal information could reasonably be expected to result in financial harm. For the reasons set out above in respect of s. 22(2)(h), because the subject of the complaint's employer already knows the contents of the report, and because the report is over four years old, I do not see how this could be the case.

[178] Past OIPC orders have held that harm under s. 22(2)(e) can include mental harm, in the form of serious mental distress or anguish, but that embarrassment, upset or having a negative reaction do not rise to the level of mental harm.[146]

[179] While I can understand why the subject of the complaint might prefer not to have their name connected to the allegations against them, it is not clear that disclosure of information connecting them to the information in the investigation report would unfairly expose them to serious mental distress or anguish. The report is generally sympathetic to them. Additionally, it is over four years old. In terms of the College's concerns about publication of the withheld information, while disclosure of the personal information at issue could allow a reader to connect the subject of the complaint to the investigation report, from a practical perspective, as their name is in records other than the investigation report, to make the connection would require some effort on behalf of a reader. I find that these factors lessen the exposure to any serious mental distress or anguish. Finally, in Order 01-12, then Commissioner Loukidelis found that the fact a third party had the opportunity to rebut allegations in the context of an investigative process weighed against a finding that any harm was "unfair" under s. 22(2)(e).[147] In this case, the subject of the complaint did have the opportunity to rebut the allegations, and I find that this fact weighs against a finding that disclosure of the personal information at issue would expose them to unfair harm.

[146] Order F20-37, 2020 BCIPC 43 (CanLII) at para 120; Order 01-15, 2001 CanLII 21569 (BC IPC) at paras 49-50; and Order 01-37, 2001 CanLII 21591 (BCIPC) at para 42.
[147] Order 01-12, 2001 CanLII 21566 (BC IPC) at paras 38-39.

[180] For all these reasons, I do not accept the College's argument that disclosure of the personal information at issue would unfairly expose the subject of the complaint to harm within the meaning of s. 22(2)(e).

Information likely inaccurate or unreliable – s. 22(2)(g)

[181] Section 22(2)(g) provides that whether disclosure will result in dissemination of information that is likely to be inaccurate or unreliable is a factor to consider in determining whether disclosure is an unreasonable invasion of a third party's personal privacy.

[182] In Order 01-19, former Commissioner Loukidelis described the purpose of s. 22(2)(g):

> It is aimed at preventing harm to individuals that can flow from the disclosure of inaccurate or unreliable information about them. For example, a public body's records may contain unfounded rumours about someone, the disclosure of which could embarrass that individual. The focus is on whether personal information of that individual is inaccurate, not whether the WCB's evidence respecting an accident is accurate or reliable.[148]

[183] The College argues that as the allegations were found to be unsubstantiated, s. 22(2)(g) weighs in favour of withholding information related to the Bullying and Harassment Complaint and investigation to prevent the dissemination of inaccurate or unreliable information.

[184] I do not accept the College's argument. First, as the former Commissioner explained, s. 22(2)(g) concerns the accuracy of personal information, not the accuracy of the broader contextual information. The personal information at issue is name and initials of the subject of the complaint and information they provided to the College about the complaint. I do not take the College to be arguing that this information is inaccurate or unreliable, and I do not accept that it is.

[185] However, even taking a broader view and considering that disclosure of the personal information would allow a reader to connect the subject of the complaint to other information in the records, I still do not accept that s. 22(2)(g) weighs in favour of withholding information related to the investigation. As discussed above, the allegations are limited to the investigation report. Where the allegations appear in the investigation report, the report's author makes clear that they are unsubstantiated. The report clearly presents both sides and concludes that the allegations are without merit. The fact that the allegations were made and investigated is true. In this context, I find that disclosing personal information would not lead to dissemination of information that is likely to be untrue or unreliable.

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[148] Order 01-19, 2001 CanLII 21573 (BC IPC) at para 42.

[186] I find that s. 22(2)(g) does not apply.

Supplied in confidence – s. 22(2)(f)

[187] Section 22(2)(f) provides that whether "the personal information has been supplied in confidence" is a factor to consider in determining whether disclosure is an unreasonable invasion of a third party's personal privacy. For s. 22(2)(f) to apply, there must be evidence that an individual supplied the personal information, and that they did so under an objectively reasonably expectation of confidentiality at the time the information was provided.[149]

[188] The College argues that workplace investigations are inherently confidential, and thus information supplied in the investigation was supplied in confidence within the meaning of s. 22(2)(f).

[189] In support of this position, the College relies on the evidence of the Manager and a copy of its Bullying and Harassment Prevention and Response Policy. The policy requires all members of the College community who are involved in complaints and investigations to maintain the confidentiality of any information they receive during the process. Based on this evidence, I accept that all personal information supplied in relation to the complaint and investigation was supplied in confidence.

[190] The College also withheld other information to which I find s. 22(2)(f) applies. It withheld an email containing a third party's views about a workplace issue involving the applicant.[150] The email's author makes clear that they intend the email to be confidential. It contains personal details and feelings. Based on the context and the personal circumstances described in the email, I find that the author supplied the information under an objectively reasonable expectation of confidentiality.

[191] The College also withheld email chains in which students and members of faculty complain to College leadership about the applicant. While these emails are not expressly marked as confidential, they contain complaints about the applicant made in the context of ongoing working and academic relationships. In my view, where a faculty member or student raises a complaint about a faculty member in this context, they do so with a reasonable expectation that their complaints will be treated confidentially.

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[149] Order F11-05, 2011 BCIPC 5 at para 41 citing and adopting the analysis in Order 01-36, 2001 CanLII 21590 (BC IPC) at paras 23-26 regarding s. 21(1)(b).
[150] Records pages 540, 934-935, 1368-1369, 1549-1550, and 1576-1577.

[192] I also note that all this information was provided by persons who had and may continue to have, ongoing working and academic relationships with the applicant. They all supplied unfavourable information about the applicant, in the context of a strained relationship between the applicant and the College. In the circumstances, disclosure of this information could result in workplace conflict, and I find that the circumstances bolster the weight of s. 22(2)(f).

Fair determination of the applicant's rights – s. 22(2)(c)

[193] Section 22(3)(c) provides that whether information is relevant to a fair determination of the applicant's rights is a factor to consider in determining whether disclosure is an unreasonable invasion of a third party's personal privacy. As the applicant stated that she made the access request to gather information related to her Human Rights Complaint, I considered whether s. 22(2)(c) might be relevant to the withheld information. However, the information the College withheld under s. 22(1) does not relate to the Human Rights Complaint, and accordingly, I find that s. 22(2)(c) is not engaged.

Applicant's personal information

[194] Past OIPC decisions have recognized that the fact that information is also the applicant's personal information is a factor that weighs in favour of disclosure.[151]

[195] Some of the withheld information is the personal of information of both the applicant and a third party. This circumstance arises where third parties have provided information about the applicant. The information that falls into this category relates to the Bullying and Harassment Complaint, employee's views, complaints, requests in relation to other workplace issues involving the applicant, and the student complaint about the applicant.

[196] I find that the fact that some of the information discussed above is also the applicant's personal information is a factor that weighs in favour of disclosure.

Applicant's existing knowledge

[197] Past OIPC orders have held that an applicant's existing knowledge about the information at issue is a factor that weighs in favour of disclosure.[152]

[198] The applicant (the person who filed the complaint) knows the identity of the subject of the complaint and can readily connect the information in the

[151] Order F23-56, 2023 BCIPC 65 (CanLII) at para 90.
[152] Orders F18-19, 2018 BCIPC 22; F17-02, 2017 BCIPC 2; F17-06 2017 BCIPC 7; F15-42, 2015 BCIPC 45; F15-29, 2015 BCIPC 32; F15-14, 2015 BCIPC 14; F11-06, 2011 BCIPC 7; F10-41, 2010 BCIPC No. 61 and 03-24, 2005 CanLII 11964 (BC IPC).

records to them, whether their name or initials are redacted or not. This factor weighs in favour disclosing their name and initials.

Sensitivity

[199] Previous OIPC orders have considered the sensitivity of the personal information at issue. Where the sensitivity of the information is high, withholding the information should be favoured.[153] However, where the information is of a non-sensitive nature or that sensitivity is reduced by the circumstances, then this factor may weigh in favour of disclosure.[154]

[200] Some of the withheld information relates to medical information, and specifically to medical conditions, medical accommodations, and reasons for medical leave. I find that all this information is sufficiently specific to enable a reader to discern information about a third party's diagnosis or medical treatment. It is well-established that medical information is highly sensitive. I find that this factor weighs against disclosure of information relating to third party's medical information, medical accommodations, and medical leave.

[201] Other information contains third parties' personal struggles and emotions about matters related to their own employment.[155] Given the personal and emotional content of this information, I find that it is sensitive, and that this factor weighs in favour of withholding this information.

[202] In addition, I find that the Bullying and Harassment Complaint information is sensitive, due to the nature of the allegations. This is a factor that weighs in favour of withholding it.

[203] Other information that the College withheld is not sensitive. In particular, the College withheld generic information about employee vacations or days off that provide little to no information about these individuals except that they took a vacation or day off. I find that the lack of sensitivity favours disclosing this kind of information.

Conclusions – s. 22(1)

[204] My conclusions regarding the personal information the College withheld from the records are below.

[153] Order F16-52, 2016 BCIPC 58 at para 87.
[154] Order F16-52, 2016 BCIPC 58 at paras 87-91 and 93.
[155] Records pages 1397-1399, 1675-1678, 1721-1724, and 1725-1729.

Information related to the Bullying and Harassment Complaint

[205] **Identifying Information:** The College withheld the name and other identifying information about the individual who was the subject of the bullying and harassment complaint. This information is known to the applicant. However, there is a difference between knowledge, and information in records disclosed through an OIPC process that connects a third party to allegations against them. While the applicant's knowledge is a factor, I find that this factor is insufficient to rebut the s. 22(3)(d) presumption that disclosure of information related to employment history and the sensitivity of the information is an unreasonable invasion of personal privacy. In this case, the College's decision to redact identifying information was an effective way to protect a third party's privacy without harming the applicant's ability to understand the records.

[206] For these reasons, I find that disclosure of the name and other identifying information about the individual who was the subject of the Bullying and Harassment Complaint would be an unreasonable invasion of their personal privacy, and I require the College to withhold this information.

[207] **Participation in the Investigation:** I come to the same conclusion with respect to the information about the subject of the complaint's participation in the investigation. The fact that this information is about the applicant weighs in favour of disclosure. However, it is not information that was known to the applicant. The College's policies make very clear that information supplied as part of a workplace investigation is supplied in confidence within the meaning of s. 22(2)(f), and the presumption in s. 22(3)(d) against disclosing information related to employment history weighs against disclosure of this information.

[208] While the fact that information is about the applicant weighs in favour of disclosure, I find that this consideration is not sufficient to rebut the s. 22(3)(d) presumption in favour of withholding information related to employment history. The fact that the information was supplied in confidence further bolsters this finding. Furthermore, considering these factors together with the circumstances, I find that the weight of s. 22(2)(f) is heightened by the strained, and potentially ongoing nature of the relationship between the applicant and the subject of the complaint as disclosing the withheld information could further damage that relationship. For these reasons, I find that disclosing this information would be an unreasonable invasion of the subject of the complaint's personal privacy, and the College is required to withhold it under s. 22(1).

Employee and student views, complaints, and requests involving the applicant

[209] The College also withheld information relating to employee and student views, complaints, and requests involving the applicant. In addition to being third party personal information, this information is also the applicant's personal

information – a factor that weighs in favour of disclosure. However, again I find that these factors are not sufficient to rebut the s. 22(3)(d) presumption against disclosing employment and educational history information, particularly where, as here, the information was supplied in confidence (s. 22(2)(f)) and arises in the context of working and academic relationships that may still be ongoing. Furthermore, due to the content of the information, I find that these ongoing relationships may be damaged by disclosure of the withheld information. Accordingly, I find that disclosing this information would be an unreasonable invasion of a third party's personal privacy, and accordingly, the College is required to withhold it under s. 22(1).

Third-party medical Information

[210] The College also withheld information relating to employee and others' medical conditions, medical accommodations, and medical leave. The presumption against disclosing medical information in s. 22(3)(a) weighs against disclosure of this information. The information is also highly sensitive. As there are no considerations weighing in favour of its disclosure, I find that disclosing the medical information would be an unreasonable invasion of a party's personal privacy, and that the College is required to withhold it.

General third party employment information

[211] The College withheld information relating to employment related information about third parties - workplace investigations (not involving the applicant), performance issues, discipline, course assignments, availability, and retirement. The presumption against disclosing employment history (s. 22(3)(d)) applies to this information, and no considerations rebut the presumption. Accordingly, I find that disclosing the employment history information would be an unreasonable invasion of a party's personal privacy, and that the College is required to withhold it.

Employee personal appointments, personal obligations, and vacations

[212] The College withheld references to employee's vacations, personal appointments, and personal obligations. Some of the vacation information is very general and contains no details (for instance, where or with whom) about the vacation.[156] This information is not sensitive, and as no other considerations or presumptions apply, I find that the College is not authorized to withhold it.

[213] The remaining information, including some of the vacation-related information include personal details about employee's lives, responsibilities,

[156] Records at pages 294, 295, 331, 400, 403, 406, 417, 556, 642, 659, 976, 977, 978, 979, 981, 982, 1159, 1218, 1223, 1230,1232, 1235, 1237, 1240, 1242,1244, 1245, 1247, 1606, 1710, 1712.

relationships, and where and how they spend their time. None of the factors identified above are relevant to this information. It relates exclusively to the third party employees' personal lives. Ultimately, the burden is on the applicant to establish that disclosure of personal information would not be an unreasonable invasion of a third party's personal privacy, and the applicant has not explained why details about third parties' vacations, personal obligations and personal appointments should be disclosed. I find that disclosure of this information would be an unreasonable invasion of third party personal privacy, and that the College is required to withhold this information under s. 22(1).

Gossip

[214] Finally, the College withheld the gossip. The gossip names specific employees and refers to information about them or that they may have said. No presumptions or considerations apply to this information. As above, it is third party personal information. The burden is on the applicant to establish that disclosure of personal information would not be an unreasonable invasion of a third party's personal privacy, and the applicant has not explained why this kind of information should be disclosed. I find that disclosure of this information would be an unreasonable invasion of third party personal privacy, and that the College is required to withhold this information under s. 22(1).

Overview – s. 22(1)

[215] By way of overview, I find that the College is required to withhold all the information it withheld under s. 22(1) except the telephone numbers[157] which are excluded contact information, and the general vacation-related information.[158]

Summary of a record under s. 22(5)(a)

[216] Section 22(5) provides that "on refusing … to disclose personal information supplied in confidence about an applicant, the … public body must give the applicant a summary of the information unless (a) the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information."

[217] Section 22(5) applies to the information provided by the individual who was the subject of the Bullying and Harassment Complaint, complaints, views and requests of other employees, and student complaints.

[218] The information supplied in confidence by employees relates to specific interpersonal issues that involved the applicant. Given the specificity of the

[157] Records page 816, 883, and 1425.
[158] Records at pages 294, 295, 331, 400, 403, 406, 417, 556, 642, 659, 976, 977, 978, 979, 981, 982, 1159, 1218, 1223, 1230,1232, 1235, 1237, 1240, 1242,1244, 1245, 1247, 1606, 1710, 1712.

matters described in the information and that applicant's familiarity with her own workplace interpersonal issues, I find that the applicant would have no difficulty identifying the person who supplied the withheld information even from a very general summary of this information. As a result, I find the College is not required to provide the applicant with a section 22(5)(a) summary of the information supplied in confidence by other employees.

[219] However, I find that the information relating to the student complaint is sufficiently generic that it could be summarized without disclosing the identity of the student involved.[159] Therefore, I find the College is required under s. 22(5)(a) to give the applicant a summary of the information that is about the applicant in the student's email. To be clear, this summary should only include information about the applicant, not any subsequent information in the email chain.

CONCLUSION

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

1. I confirm, in full, the College's decision to refuse access to the information withheld in the records under s. 14.

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

3. I require the College to refuse access to the information in dispute under s. 22(1) that I have addressed in item 4, below.

4. I require the College to give the applicant access to the information that I have found the College is not authorized to withhold under s. 13(1) and not required to withhold under s. 22(1). The information the College is required to provide to the applicant is highlighted in green in a copy of the records that will be provided to the College with this order, and found at pages 294, 295, 331, 350, 354, 400, 403, 406, 417, 556, 642, 659, 816, 883, 976, 977, 978, 979, 981, 982, 1159, 1218, 1223, 1230,1232, 1235, 1237, 1240, 1242,1244, 1245, 1247, 1425, 1606, 1710, 1712 of the records.

5. The College must concurrently provide the OIPC registrar of inquiries with proof that it has complied with the terms of this order, along with a copy of the records that it provides to the applicant.

6. Under s. 58(3)(a), I require the College to perform its duty under s. 22(5) to give the applicant a summary of the information supplied in confidence about her in the email located on p. 1442-1443 of the records. This

[159] Records page 1442-1443.

information is highlighted in yellow in the copy of the records that will be provided to the College with this order.

7. As a condition under s. 58(4), I require the College to provide the OIPC registrar of inquiries with the s. 22(5) summary for my approval before the compliance date for this order specified below.

[221] Pursuant to s. 59(1) of FIPPA, the College is required to comply with this order by **January 12, 2024**.

November 28, 2023

ORIGINAL SIGNED BY

Allison Shamas, Adjudicator

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