

IN THE MATTER OF:

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

AND IN THE MATTER OF:

AN ADJUDICATION UNDER SECTION 62,
REQUESTED BY [F.M.]
ON OCTOBER 2, 1996

REASONS FOR DECISION
OF THE HONOURABLE
MR. JUSTICE BAUMAN

I. INTRODUCTION

This matter comes before me in my capacity as an adjudicator designated under s. 60 of the Freedom of Information and Protection of Privacy Act R.S.B.C. 1996, c. 165 (“the Act”).

It concerns a request made by [Mr. M.] for the review of a decision of the Information and Privacy Commissioner (the “Commissioner”) dated September 26, 1996 and supplemented on October 3, 1996.

The decision was rendered on the [Mr. M. 's] request for access to certain information in the files of the Commissioner’s office. That application was dated September 6, 1996 and in it the applicant requested “...copies of records showing the personal information of all the people employed in the Office of the Information and Privacy Commissioner, particularly their names, ages, educational and employment histories as well as emoluments”.

II. THE COMMISSIONER’S DECISION

The Commissioner responded to the application in writing on September 26 and October 3, 1996. He provided:

- (a) the names and positions of the Commissioner’s staff over the past year (taken from his office’s 1995 - 1996 annual report);

- (b) the salary ranges for each position;
- (c) their emoluments, described as the standard Public Service benefit package.

The Commissioner declined to provide the age, educational or employment histories of his staff on the ground that this was personal information exempted from release under s. 22(3)(d) of the Act.

The educational or employment histories withheld included job competition packages submitted by the Commissioner's staff when they made application for their positions. These documents included covering correspondence from the applicant, completed application forms and the applicant's resume. In later competitions these packages included a narrative description of the applicant's knowledge, skills and abilities for the position and incorporated their relevant educational and employment history.

III. REVIEW PROCESS

By memorandum I invited the parties to make written submissions. The Commissioner filed argument, through counsel, on February 21, 1997. *[Mr. M.]* responded in kind on March 10, 1997.

The Commissioner then filed a reply submission on March 24, 1997. *[Mr. M.]* filed an objection to my receipt of the reply, pointing out, correctly, that in my invitation for submissions I did not contemplate the Commissioner enjoying a right of reply.

That oversight is my responsibility. Basic fairness in the process calls for a right of reply. By memorandum I so advised the parties and I invited *[Mr. M.]* to file a surrebuttal on any new points in the Commissioner's reply. He did so on June 9, 1997.

IV. THE MERITS

The Commissioner rests his position on ss. 22(1) and 22(3)(d) of the Act. Those sections provide:

- 22.(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
- 22.(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if...

(d) the personal information relates to employment, occupational or educational history.

“Personal information” is defined in Schedule 1 of the Act as follows:

“personal information” means recorded information about an identifiable individual, including

- (a) the individual’s name, address or telephone number,
- (b) the individual’s race, national or ethnic origin, colour, or religious or political beliefs or associations,
- (c) the individual’s age, sex, sexual orientation, marital status or family status,
- (d) an identifying number, symbol or other particular assigned to the individual,
- (e) the individual’s fingerprints, blood type or inheritable characteristics,
- (f) information about the individual’s health care history, including a physical or mental disability,
- (g) information about the individual’s educational, financial, criminal or employment history,
- (h) anyone else’s opinions about the individual, and
- (i) the individual’s personal view or opinions, except if they are about someone else;

Two further subsections of s. 22 are relevant:

22.(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party’s personal privacy, the head of a public body must consider all the relevant circumstances, including whether

- (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to scrutiny,
- (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,

- (c) the personal information is relevant to a fair determination of the applicant's rights,
 - (d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,
 - (e) the third party will be exposed unfairly to financial or other harm,
 - (f) the personal information has been supplied in confidence,
 - (g) the personal information is likely to be inaccurate or unreliable, and
 - (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
- 22.(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if...
- (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff.

The relevant statutory scheme may, in my view, be summarized in this manner:

- (i) Section 22(1) creates a mandatory duty on the Commissioner to refuse to disclose personal information if it would be an unreasonable invasion of a third party's personal privacy.
- (ii) Section 22(3) in turn creates a rebuttable presumption that disclosure, in this case, of personal information relating to the employment, occupational or educational background of a person is an unreasonable invasion of that person's personal privacy.
- (iii) Section 22(2) provides an inclusive list of considerations which the Commissioner must have to mind in determining whether the presumption of "unreasonableness" has been rebutted.
- (iv) Section 22(4) importantly acts as an exception to all of the foregoing by conclusively deeming the disclosure of certain personal information not to be an unreasonable invasion of a third party's personal privacy. In the context of this case that information includes the third party's "position, functions or remuneration as an officer, employee or member of a public body..."

The Commissioner's submissions deal squarely with the inter-play between ss. 22(3)(d) and 22(4)(e). The Commissioner argues:

Sections 22(3)(d) and 22(4)(e) of the Act balance the desirability of public access to information about public service jobs (s. 22(4)(e)) against the desirability of strong privacy protection for the public servants at an individual level. The result of the interrelationship between ss. 22(3)(d) and 22(4)(e) is that the public have been given a right to general information regarding public service job descriptions and qualifications, but do not have rights to: (a) information about position, function or remuneration which is private to a public servant, or (b) historical information about a public servant's employment or education: Commissioner's Order No. 54-1995 (Tab 1) and No. 128-1996 (Tab 2).

I agree with the Commissioner's first point that the noted sections represent a balancing between public access to information and the protection of a public servant's privacy. But I respectfully disagree with the view then expressed that the public do not have a right to "information about position, function or remuneration which is private to a public servant".

The very essence of s. 22(4) is the fact that it is, statutorily, not an unreasonable invasion of a third party's personal privacy if the information is about that person's position, functions or remuneration as an officer or employee of a public body. "Personal information" is, by definition, "recorded information about an identifiable individual".

To say that s. 22(4)(e) covers general information regarding public service job descriptions and qualifications but that it does not extend to information about position, functions or remuneration "which is private to a public servant" is, with respect, to rob s. 22(4)(e) of its efficacy.

Section 22(4)(e) deals with information that by definition includes private information of a public servant relating to the listed subjects.

I prefer instead the reasoning of the Commissioner set out at paragraph 20 of its submission:

There is an interrelationship between ss. 22(3)(d) and 22(4)(e) of the Act, but no overlap. Since the records in issue (employment or educational histories) are explicitly covered by the presumption in s. 22(3)(d), they do not fall under the presumption in s. 22(4)(e). So long as there [is] no countervailing consideration in s. 22(2), the Commissioner is required to accept the presumption in s. 22(3)(d) of the Act and refuse access.

I note parenthetically, however, that I do not characterize s. 22(4) as creating a presumption.

In my opinion the information described in s. 22(3)(d) is of a different class than that contemplated by s. 22(4)(e).

The former is information of a historical nature concerning the individual. The latter contemplates information about the public servant of a current nature in relation to the person's position. Section 22(3)(d) might be said to describe information about "where" a person came from in terms of education or employment. Section 22(4)(e), on the other hand, deals with where the person "is" in the context of his or her position as an employee of a public body.

I have been analyzing the sections in temporal terms but I do not mean to suggest that s. 22(4)(e) would not extend to information of the sort described concerning a person who previously held a position as an officer, employee or member of a public body. That question is not before me.

In my view it becomes a matter of construing, in any case, the breadth of the class of information about a person's "position, functions or remuneration" described in s. 22(4)(e). It does not include the information set out in s. 22(3)(d).

Whether it would include any information described, for example, in s. 22(3)(g) is not before me and I should perhaps prudently refrain from expressing an opinion.

In general, however, I tend to the view that s. 22(4)(e) describes information of a fairly narrow scope. A third party's "position" means, I think, something akin to his or her job title, rather than his or her internal performance rating, for example, at the time of the request. The thrust of my opinion is simply that one cannot categorically exclude from the compass of s. 22(4)(e) information about position, function or remuneration "which is private to a public servant".

It follows from what I have said that in my view the Commissioner was correct in refusing to disclose the job competition packages. As well, he was right in refusing to disclose the ages of the individual employees. Their ages are not information contemplated by s. 22(4)(e) of the Act.

[*Mr. M.*] bears the burden under s. 57(2) of proving that disclosure would not be an unreasonable invasion of a third party's personal privacy and he has not discharged that burden before me.

There is one further point and that concerns [*Mr. M.'s*] submission that the Commissioner should have initially provided him with actual individual and salary and benefit information rather than the salary ranges by position which he did provide. [*Mr. M.*] is essentially correct on this point and I note that the

Commissioner apparently agrees because, with the clarification made by *[Mr. M.]*, the Commissioner proposes now to provide *[Mr. M.]* with:

- (a) annual salaries specific to individual staff members; and
- (b) the Public Service Employee Relations Commission's Employee Benefit Guide which describes the benefit plans available to employees of the Province of British Columbia