



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

Protecting privacy. Promoting transparency.

Order F14-39

MINISTRY OF FORESTS, LANDS AND NATURAL RESOURCE OPERATIONS

Ross Alexander, Adjudicator

September 18, 2014

CanLII Cite: 2014 BCIPC 42.

Quicklaw Cite: [2014] B.C.I.P.C.D. No. 42

Summary: The applicant requested records relating to the water flow of a creek and tributaries for the period from 1965 to 1996. The Ministry of Forests, Lands and Natural Resource Operations released most of the responsive records, but withheld information that would identify individuals in relation to water use and water use complaints. The information was withheld on the basis that disclosure would be an unreasonable invasion of the personal privacy of third parties under s. 22 of FIPPA. The adjudicator determined that s. 22 does not apply to most of the withheld information given the context and content of the information, and ordered the Ministry to disclose it. However, the adjudicator determined that s. 22 applies to a small amount of information, and ordered the Ministry to withhold it under s. 22.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 22

Authorities Considered: **B.C.:** Order F05-18, 2005 CanLII 24734 (BC IPC); Order 01-07, 2001 CanLII 21561 (BC IPC); Order F12-08, 2012 BCIPC 12 (CanLII); Order 01-37, 2001 CanLII 21591 (BC IPC); Order F14-17, 2014 BCIPC 20 (CanLII); Decision F10-10, 2010 BCIPC 49 (CanLII); Order 01-26, 2001 CanLII 21580 (BC IPC). **ON.:** Order MO-1506, 2001 CanLII 26201 (ON IPC).

INTRODUCTION

[1] This inquiry concerns an applicant's request for records relating to the flow of water in Robbins Creek and its tributaries above Cowans Meadows between 1965 and 1996. The creek is located near Kamloops, BC.

[2] The Ministry of Forests, Lands and Natural Resource Operations ("Ministry") responded to the applicant's request by releasing most of the responsive records. However, it withheld some information on the basis that disclosure would be an unreasonable invasion of the personal privacy of third parties under s. 22 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[3] The applicant made a request to the Office of the Information and Privacy Commissioner ("OIPC") to review the Ministry's decision to deny access to information. The Ministry released additional information during the OIPC review process, but it continued to withhold some information under s. 22 of FIPPA. The review process did not resolve the matter, and the applicant requested an inquiry under Part 5 of FIPPA.

ISSUE

[4] The issue in this inquiry is whether the Ministry is required to refuse access to information because disclosure would be an unreasonable invasion of third party personal privacy under s. 22 of FIPPA.

[5] The applicant has the burden to prove that disclosure of personal information would not be an unreasonable invasion of the third party's personal privacy due to s. 57(2) of FIPPA.

DISCUSSION

[6] **Background**—Robbins Creek is located near Kamloops, BC. It provides water for a number of properties in the area. The applicant owns one of those properties.

[7] There have been multiple diversions of Robbins Creek over the past 50 years that have changed its flow and impacted the extent to which properties have been able to benefit from the creek water.

[8] In 2011, the Ministry approved changes to the path of the creek, which the Ministry said would restore it to its original course. The applicant says this change will dewater his property.

[9] The applicant wants the creek to continue to go through his property. He believes the Ministry improperly decided to change the path of creek and says that it was the result of political interference because the change will benefit a “developer” property owner who belongs to the same political party in Kamloops as a cabinet minister. The Ministry categorically denies these allegations. It states that the decision was made by the Assistant Regional Water Manager without any instructions, communications or influence from senior ministry or government officials. The Ministry adds that the decision was made solely on the basis of what would be the best course for the creek without regards to which landowners will benefit over others.

[10] The applicant asserts that a number of previous diversions to Robbins Creek contravened the *Water Act*, and he is contesting four alleged diversions. In the applicant’s view, the Ministry is using exceptions in FIPPA “as a façade to cover-up its own actions with respect to what occurred on this watershed over the last half century.”¹

[11] The applicant is a party to a matter to be heard by the Environmental Appeal Board (“EAB”) about the Ministry’s decision to change the path of Robbins Creek. He says he needs unredacted copies of all of the Ministry’s records because the Ministry is giving itself an unfair advantage if it has the full, unredacted material but the applicant does not.

[12] **Records in dispute**—The responsive records are letters, memos, notes, photographs and charts dated between 1965 and 1996 related to the creek and its tributaries and diversions. The Ministry has disclosed the vast majority of the information in the responsive records to the applicant, but it is withholding a number of short excerpts in some of these records, such as:

- a) the addresses for water license holders whose identities have already been disclosed elsewhere in the same record;²
- b) the names and other identifying information of third parties contained in: complaints; inquiries or requests for records made to the Ministry by third parties (or their lawyer); notes, memos and similar documents about Ministry investigations and work regarding water issues; letters from the Ministry to third parties; and documents stating the position taken by a number of third parties regarding various topics related to the creek. These third parties are generally the names of complainants, landowners who are the subject of complaints, people using water or with water use

¹ Applicant’s initial submissions at lines 55 and 56.

² Pages 2, 3, 18, 19, 51 and 124.

rights, and people who objected or raised concerns about various creek diversions;³ and

- c) information about a water bailiff's invoices, and other information about the availability for work of a water bailiff and an agrologist.⁴

[13] The Ministry has already disclosed some of the information described above to the applicant as part of the EAB process, so he already knows the content of that information. The Ministry therefore states it presumes that these records are no longer at issue and offers to provide them to the applicant again as part of the EAB process if the applicant has lost the copies of those pages. However, the applicant submits that he wants this information disclosed as part of the freedom of information request process ("FOI process") because the records produced by the Ministry in the EAB process are subject to a confidentiality agreement and he wants to be able to use the information for other purposes. Therefore, this information remains at issue in this inquiry.

[14] **Preliminary matter**—The applicant is concerned that his conflict with the government and the EAB document discovery process is impacting and unfairly limiting the records the Ministry is disclosing to him in the FOI process.

[15] FIPPA provides a statutory right for a person to request records in the custody or control of a public body, as well as an obligation for the public body to respond. An applicant's request for records under FIPPA is independent from document production under an EAB proceeding (or any other proceeding). In fact, disclosure under FIPPA may result in different disclosure than in another proceeding, since the rules respecting disclosure are typically different.⁵ Applicants then have the right to request an independent OIPC review of any decision, act or failure of the public body in response to their request for records under FIPPA if they are dissatisfied with the public body's response.⁶

[16] This inquiry is the result of the applicant exercising this right to request an independent review of whether the Ministry is properly withholding information from the applicant. Since the OIPC inquiry provides an independent decision about whether FIPPA applies to the withheld information, it ensures that the information is withheld because FIPPA applies rather than for other reasons.

³ Pages 6, 9, 10, 13, 16, 17, 20 to 27, 35 to 37, 42, 43, 47 to 50, 53 to 62, 90,109,125 to 131, 132 (which also contains a very small amount of personal information in addition to name and identifying information), 133 and 135.

⁴ Pages 36, 37, 42 and 60.

⁵ Which explains, for example, why the Ministry disclosed certain full unsevered records to the applicant in the EAB process, but it is withholding portions of those same records from the applicant under s. 22 of FIPPA in the FOI process.

⁶ The OIPC is an office of the Legislature that provides independent oversight and enforcement of B.C.'s access and privacy laws. Section 52 of FIPPA provides applicants with the statutory right to ask for a review.

Therefore, the EAB process is not impacting or unfairly limiting the applicant's access to the records in the FOI process for the records the Ministry identified as responsive to the applicant's request.

[17] The applicant is concerned that the Ministry has either failed in its disclosure obligations or it is actively concealing records by not identifying all records that are responsive to his request. In support of this, the applicant says that the Ministry provided redacted records in the EAB process, but these same records were not provided in the FOI process.⁷

[18] While the applicant does not expressly say so, in effect this is an argument that the Ministry has not met its obligation to assist the applicant and respond openly, accurately and completely pursuant to s. 6 of FIPPA. The applicant requests disclosure of all documents (including the ones the Ministry provided to him in the EAB process but not the FOI process) and that a separate investigation be undertaken if this inquiry cannot deal with the issues raised by the applicant about the conduct of the Ministry.

[19] The applicant's request for review to the OIPC was about the Ministry's decision to withhold information from the responsive records under s. 22. His request for review does not contain a complaint that the Ministry failed to identify responsive records in its response to him. Further, the applicant's concern regarding the Ministry's alleged failure to identify responsive records – and the issue of whether the Ministry complied with s. 6 of FIPPA – is not in the Notice of Inquiry or the Investigator's Fact Report. Given this, the Ministry has not received an adequate opportunity to respond to the applicant's allegations. Moreover, the applicant does not explain why he is attempting to add this issue at this late stage in the proceeding. Therefore, in my view, it is not appropriate to add this s. 6 issue now and I will not determine whether the Ministry met its s. 6 obligations in responding to the applicant's request for records.

Section 22

[20] Numerous orders have considered the analytical approach to s. 22. It is first necessary to determine if the information in dispute is "personal information" as defined by FIPPA. If so, it must be determined whether the information meets the criteria identified in s. 22(4). If s. 22(4) applies, s. 22 does not require the public body to refuse to disclose the information. If s. 22(4) does not apply, it is necessary to determine whether disclosure of the information falls within s. 22(3). If s. 23(3) applies, disclosure is presumed to be an unreasonable invasion of third party privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, it is still necessary to consider all relevant circumstances,

⁷ The applicant did not provide a copy of the records he says he received in the EAB process but not the FOI process, so I am not in a position to determine if they are – in fact – responsive to his request under FIPPA.

including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.

[21] The applicant submits: the information at issue is not personal information; disclosure would not be an unreasonable invasion of personal privacy because ss. 22(4)(i) and (j) apply; s. 22(3) applies to the extent that disclosure is necessary to help the applicant find out information; and ss. 22(2)(a), (b) and (c) apply, which favour disclosure of the information. He states that disclosure of the withheld information would not be an unreasonable invasion of personal privacy because it relates to a public license, so no personal privacy rights apply here. He also points out that the information is historical rather than recent. Further, in his view, withholding the information will shield the Ministry from public scrutiny and give it an unfair advantage in the EAB proceeding.

[22] The Ministry submits that the applicant's submissions do not recognize the privacy interests of the individuals whose names are at issue in this inquiry, and that the applicant has failed to discharge his burden of proving that disclosure of the personal information at issue would not be an unreasonable invasion of personal privacy of those third parties. The Ministry submits that the withheld information is clearly personal information, and that none of the provisions in s. 22(4), s. 22(3), or ss. 22(2)(a), (b) or (c) apply. The Ministry submits that it reviewed the personal information and determined that disclosure of it would be unreasonable invasion of third party personal privacy.

Personal Information

[23] The term personal information under FIPPA means "recorded information about an identifiable individual other than contact information".⁸ 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;

[24] The applicant submits that information about water licensees is not personal information because it is "public information". However, the issue when determining whether information is personal information relates to whether the information is "about" an identifiable individual, not whether the information is public or private.

[25] The information at issue is clearly about identifiable individuals. Further, while much of this information comprises names or addresses, it is not contact

⁸ Definitions are in Schedule 1 of FIPPA.

information because it is in the context of people in their personal lives, not to enable them to be contacted at a place of business.

Section 22(4)

[26] If any of the circumstances in s. 22(4) apply to the personal information, it cannot be withheld under s. 22. The applicant submits that ss. 22(4)(i) and (j) apply, while the Ministry submits that none of the provisions in s. 22(4) are applicable. The relevant parts of s. 22(4) state:

- (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

...

- (i) the disclosure, in respect of
- (i) a licence, a permit or any other similar discretionary benefit, or
 - (ii) a degree, a diploma or a certificate,

reveals any of the following with respect to the applicable item in subparagraph (i) or (ii):

- (iii) the name of the third party to whom the item applies;
 - (iv) what the item grants or confers on the third party or authorizes the third party to do;
 - (v) the status of the item;
 - (vi) the date the item was conferred or granted;
 - (vii) the period of time the item is valid;
 - (viii) the date the item expires, or
- (j) the disclosure, in respect of a discretionary benefit of a financial nature granted to a third party by a public body, not including personal information referred to in subsection (3) (c), reveals any of the following with respect to the benefit:
- (i) the name of the third party to whom the benefit applies;
 - (ii) what the benefit grants to the third party;
 - (iii) the date the benefit was granted;
 - (iv) the period of time the benefit is valid;
 - (v) the date the benefit ceases.

[27] The applicant submits that s. 22(4)(i) applies to all of the information because it focuses on the obligations and responsibilities of water license holders under the *Water Act*, as well as the conduct of government with respect to its own obligations and responsibilities. He submits that s. 22(4)(j) applies because water licenses are issued at the discretion of the Minister, and the benefit of being able to access creek water for domestic and irrigation purposes exceeds the small fee that water licensees pay for their licenses.

[28] The Ministry denies that s. 22(4)(i) applies, stating that it has already released the names of licensees as they appear in the context of those licenses. It submits that the withheld information, including the names of water licensees in the context of complaints, does not fall under s. 22(4)(i). It does not make any specific submissions with respect to s. 22(4)(j).

[29] Based on my review of the materials, I find that s. 22(4)(i) does not apply in this case. This is because none of the withheld information is in respect of a licence, permit or any other similar discretionary benefit that reveals the types of information at ss. 22(4)(iii) to (viii). I also find that s. 22(4)(j) does not apply because regardless of whether the information is in respect of a discretionary benefit of a financial nature, it does not reveal the types of information at ss. 22(4)(j)(i) to (v). I find that none of the circumstances in s. 22(4) apply to the withheld information.

Section 22(3)

[30] Section 22(3) states that disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if any of the circumstances in s. 22(3) apply. The parties each submit that provisions in s. 22(3) do not apply, except the applicant submits s. 22(3)(b) applies in favour of disclosing the withheld information to the extent that it helps him investigate and find out additional information.

[31] The applicant misunderstands s. 22(3)(b). That section, if satisfied, only creates a presumption that disclosing information would be unreasonable. It is not a ground that favours disclosure of information if it is not met.

[32] I find that none of the provisions in s. 22(3) apply to the withheld information, with a few exceptions. The exceptions relate to monies a water bailiff invoiced a few third parties, and some information about a water bailiff and an agrologist taking time off from work.⁹ I find that s. 22(3)(d) applies to these excerpts because they are personal information relating to employment, occupational or educational history. I also find that s. 22(3)(a) applies to one of these excerpts because it relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation. Further, I find that the

⁹ Pages 36, 37, 42, 60.

invoice information falls under s. 22(3)(f) in their context because it is describing the income and liabilities of third parties.

Section 22(2)

[33] Section 22(2) states that all relevant circumstances, including those listed in s. 22(2), must be considered to determine whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy. The applicant submits that ss. 22(2)(a), (b) and (c) apply to the withheld information, while the Ministry submits that they do not. The Ministry does not expressly state that s. 22(2)(e) applies, but it makes submissions regarding the subject matter of this provision so I will consider it below in addition to other relevant factors.

[34] Section 22(2) states in part:

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 public 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,
- ...
- (e) the third party will be exposed unfairly to financial or other harm

Section 22(2)(a)

[35] As stated in Order F05-18, the rationale for s. 22(2)(a) regarding subjecting the activities of a public body to public scrutiny is that this circumstance may support disclosure of third party personal information where disclosure of the information would foster accountability of a public body.¹⁰

[36] The applicant submits that the actions of the Ministry should be subjected to public scrutiny and s. 22(2)(a) applies because the Ministry made a decision favouring a “developer” over affected landowners. The applicant submits that s. 22(2)(a) also applies because he is requesting historical information and – according to the applicant – the government failed to act in accordance with the

¹⁰ Order F05-18, 2005 CanLII 24734.

Water Act when it received a complaint about a diversion of the creek over 40 years ago.

[37] In order for s. 22(2)(a) to apply, disclosure of the information that is in dispute must be desirable for the purpose of subjecting the Ministry to public scrutiny. In this case, the Ministry has already provided the applicant with nearly all of the information in the responsive records. The withheld information is the names of complainants, landowners who are the subject of complaints, lists of people who objected or raised concerns about various creek diversions, and a small amount of information about leave from work for a water bailiff and an agrologist. The applicant has not explained how having access to the names of complainants or landowners - or being able to disclose the identities of parties that he already knows through the EAB process – is desirable for the purpose of subjecting the Ministry to public scrutiny. I therefore find that s. 22(2)(a) does not favour disclosure of the information at issue in this case.

Section 22(2)(b)

[38] The applicant submits that “disclosure is likely to promote the protection of the environment because there has been a creek bed running through a number of properties forever”, and the Ministry’s changes to the creek will dry up the land to the detriment of the vegetation and the wildlife that depend on the ponds, swamps and sloughs on those properties.¹¹ While I understand the applicant’s argument that there will be harm to the environment if the water is diverted, the applicant does not explain specifically how disclosure of the withheld information in this inquiry is likely to promote protection of the environment. Even assuming for the sake of argument only that preventing the creek diversion will promote the protection of the environment and that the creek diversion will not occur if the applicant is successful in his EAB proceeding,¹² it is not clear to me how the applicant receiving the identities of the complainants and other identifying information (some of which he has already received as part of the EAB proceeding) would impact the EAB proceeding or otherwise promote the protection of the environment. I therefore find that s. 22(2)(b) does not apply to the withheld information.

Section 22(2)(c)

[39] Section 22(2)(c) weighs in favour of disclosure if the personal information at issue is relevant to a fair determination of the applicant's rights. Previous orders have held that s. 22(2)(c) only applies if all of the following circumstances are met:

¹¹ Applicant’s initial submissions at lines 131 to 140.

¹² The materials before me do not disclose the precise issues that are before the EAB.

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.¹³

[40] The Ministry submits that it has disclosed approximately 400 pages of unredacted records to the applicant during the course of the EAB proceedings. It further submits that the EAB Procedure Manual entitles the applicant to make an application to the EAB for production of relevant documents, and that this is a relevant factor in dealing with s. 22(2)(c).

[41] The applicant submits the withheld information is relevant to a fair determination of his rights because the rules of natural justice entitle him to fair and full disclosure of all documents relating to the creeks in this watershed. He states that deleting the names of water licensees makes it impossible to determine from the records what was at issue in these historical disputes, who was involved, and the locations of these disputes. He also points out that he and the Ministry had different views about what documents are relevant to the EAB proceeding, and he believes the Ministry is limiting the information that is made available to him.

[42] Given the ongoing EAB proceeding regarding the decision to change the flow of Robbins Creek and that the outcome of that proceeding is likely to impact the applicant's land, I find that part 1 of the above test requiring the applicant to have a legal right as opposed to only a moral right is met. This is because, at minimum, the applicant has a right of appeal under s. 92(1)(b) of the *Water Act* because he is an owner whose land is likely to be physically affected by the water manager's order. Part 2 of the test above is also met because the EAB proceeding is underway.¹⁴

¹³ Order 01-07, 2001 CanLII 21561 (BC IPC) at para. 31 citing Ontario Order P-651 1994, CanLII 6573 (ON IPC).

¹⁴ The applicant's submission that he "may have the anticipation" of commencing a BC Supreme Court action does not meet part two of the test under s. 22(2)(c) because, as stated in Order F12-08, 2012 BCIPC No. 12 (CanLii) at para. 29, "contemplated proceedings" in that requirement refers to situations where a decision has been made to commence legal proceedings.

[43] The pleadings and other related materials for the EAB proceeding are not before me in this inquiry, so I do not know precisely the issues that the EAB is considering. The Ministry describes the EAB proceeding as an appeal under the *Water Act* in relation to a decision by the assistant regional water manager to approve the stream channel restoration of Robbins Creek. The applicant raises a number of additional historical concerns in relation to creek diversions he would like addressed; however, he also states that the issues the EAB is considering are narrower than he would like. Given the materials before me, when considering s. 22(2)(c) I will proceed on the basis that the EAB proceeding is only related to the assistant regional water manager's recent decision to change the flow of Robbins Creek.

[44] Parts 3 and 4 of the test above for s. 22(2)(c) are that the personal information sought by the applicant must have some bearing on, or significance for, the determination of the right in question and be necessary in order to prepare for the proceeding or to ensure a fair hearing.

[45] The applicant submits that the Ministry has all of the information in dispute here in unredacted form, so it will have an unfair advantage unless he also has the information in unredacted form. This submission is not persuasive because the applicant does not explain how disclosure of the information in dispute has a bearing on, or significance for, determining the right that is at issue in the EAB matter. Further, it is not apparent to me from my review of the materials how the identity information of third parties in dated records will have a bearing on the EAB matter, so I find that part 3 of the test for s. 22(2)(c) is not met. The applicant also does not explain how this information would help him prepare for the hearing. Further, I note that some of the information withheld in the FOI process has already been disclosed to the applicant in the EAB disclosure process, and the applicant clearly does not require this information to prepare for or to ensure a fair EAB hearing. For these reasons, I also find that part 4 is not met, and that s. 22(2)(c) does not favour disclosure of the withheld information.

Section 22(2)(e)

[46] The circumstance in s. 22(2)(e) is whether disclosure would unfairly expose third parties to financial or other harm. Previous orders, such as Order 01-37, have interpreted other harm to include harm consisting of serious mental distress or anguish or harassment.¹⁵

[47] The Ministry states there have been incidents over the years where property owners (not the applicant) have threatened violence against other property owners, as well as occasions where law enforcement has been called in to deal with such situations. It says it is concerned that disclosure of the withheld personal information would expose the third parties to harm given the often

¹⁵ Order 01-37, 2001 CanLII 21591 (BC IPC).

contentious nature of water disputes amongst adjacent property owners. The Ministry is also concerned that disclosure would result in harm to relationships between third parties.

[48] The applicant submits that possible conflicts between water licensees should not impact whether he is entitled to the withheld information. He submits that, in any event, all of the water licensees are in agreement that the recent change to the creek is not desirable and he provides a letter that is, in substance, a petition to the Ministry to this effect that was signed by more than 25 people.

[49] The withheld information is personal information, most of which relates to complaints or other dealings with the creek water flow. It is historical information, the most recent of which is 18 years old. While I do not doubt the Ministry's submission that water rights issues are contentious and that the disclosure of complaints and other dealings in relation to water rights may expose third parties to financial or other harm under s. 22(2)(e) in certain situations, I am not satisfied from the materials before me that this is the case here given the age and actual content of the information. I therefore find that s. 22(2)(e) does not weigh against disclosure in this case.

[50] **Other Factors**— Previous orders of this office have generally determined that public bodies are required to withhold the names and other identifying information of complainants under s. 22.¹⁶ The findings in these orders are generally based on the fact that the identities of the complainants were treated confidentially by the public bodies and were supplied by the third parties in confidence within the meaning of s. 22(2)(f).

[51] The applicant submits that the withheld information is public information because it relates to water, which is a public resource. The names of the water licence holders have already been disclosed, and the applicant submits that the actions taken by water licensees with respect to their license should also be publicly known to ensure accountability. In the applicant's view, information that relates to water licenses and related uses of water ought to be public due to the subject matter.

[52] Notably, the Ministry does not submit that the information in this case is supplied in confidence. This may be because it appears on the face of the records that the complaints were handled in a relatively open manner at the time of the investigations into the complaints, likely in part due to the fact it was plainly apparent to those involved who was using or not receiving the creek water.¹⁷ It is

¹⁶ For example, Order F14-17, 2014 BCIPC 20 (CanLII), Decision F10-10, 2010 BCIPC 49 (CanLII), *et. al.*

¹⁷ There is, for example, a complaint dated May 2, 1980 (at p. 6) where the complainant outlines how each of the complainant's neighbours were using the creek water. The subject matter of this

also apparent that the Ministry disclosed the identity of the complainant to the people being investigated, at least for some of the complaints. For example, in 1972 one property owner alleged that neighbouring owners were improperly diverting and using water. The Ministry investigated his complaint, and then copied the neighbours in the letter to the complainant rejecting the complaint.¹⁸ Moreover, a significant portion of the withheld information relates to concerns raised by one complainant. The identity of this complainant and the person complained against are already publicly known, since the complainant subsequently commenced legal action against this person for this issue. In my view, the fact that the Ministry addressed the complaint information in a fairly open manner at the time complaints, and that some of it is clearly publicly known, favours disclosure of this information relative to complaints in circumstances where the public body treats identity information as confidential or where there is evidence to suggest that the third party complainants supplied their identities in confidence.

[53] I also note that the circumstances of this case are different than in previous orders, where in most cases an applicant was seeking the identity of the person or people who made a complaint against the applicant shortly after the complaint is made. In this case, the applicant is seeking historical information from between 1965 and 1996 (18 to 49 years ago) to help find out information about the historical water flow and diversions of the creek. In my view, the age and context of the information supports the conclusion that disclosure would not be an unreasonable invasion of personal privacy.

[54] Further, some of the information in dispute here is not particularly sensitive information. For example, some of the withheld information is the addresses of people who held water licenses in the late-1980s, which likely could have been found in a telephone book. This information is not in the context of a complaint by or against these people. In my view, the nature and context of this information is a factor that supports disclosure of this information because it is less likely that disclosure in this context would be an unreasonable invasion of personal privacy.

Section 22(1)

[55] To summarize, the records in dispute contain personal information and s. 22(4) does not apply. None of the presumptions in s. 22(3) that disclosure would be an unreasonable invasion of personal privacy apply to most of the information, but ss. 22(3)(a), (d) and/or (f) apply to a small amount of information because it relates to medical, financial, employment history, or educational

letter has already been disclosed to the applicant, but the identities of the complainant and the neighbours have been withheld.

¹⁸ Pages 130 to 132.

history information. Further, none of the factors listed in s. 22(2) are relevant in this case.

[56] As stated above, there is a small amount of information about the water bailiff, the agrologist and other third parties where there is a presumption that disclosure would be unreasonable because it relates to medical, financial, employment history, or educational history information. I find that there are no factors sufficient to rebut these presumptions for this information. I find that the Ministry is required to withhold it under s. 22 because disclosure would be an unreasonable invasion of the personal privacy of these third parties.

[57] For the remaining withheld information, in my view there are no significant factors that favour a finding that disclosure would be an unreasonable invasion of personal privacy. However, notwithstanding the lack of circumstances indicating that disclosure would be an unreasonable invasion of personal privacy, the burden of proof is on the applicant to establish that disclosure would not be an unreasonable invasion of the third parties' personal privacy under s. 57(2) of FIPPA.

[58] The circumstances in previous orders about the identity of the people involved in complaints about a breach of law or bylaw contravention have usually been that the complaints were made and investigated in confidence.¹⁹ In those previous orders, it was determined that disclosure of the identity information would be an unreasonable invasion of personal privacy of third parties. However, the circumstances in this case are different. It is apparent in this case that the complaints at issue were accepted and investigated in a relatively open manner, and the identities of the complainant and people who were the subject of the complaint were not held in confidence. In addition to this, some of this identity information is already publicly available because a court action was commenced with respect to one of the complaints. Further, some of the other withheld information is closer to a public petition than a private complaint, as it is a joint letter to the Ministry signed by over 10 people. Given that all of the signatures are on one page, individuals who were given an opportunity to sign the letter would have had the opportunity to see these signatures and this personal information is already known by a number of people.²⁰

[59] The remaining withheld information is not particularly sensitive information. It is information such as civic address information of already identified third parties who held water licenses or owned property around the creek at the time the records were created. This information would have been relatively well known in the community at the time the records were drafted, and

¹⁹ For example, Order F14-17, 2014 BCIPC No. 20 (CanLII), Decision F10-10, 2010 BCIPC 49 (CanLII), *et. al.*

²⁰ For a discussion of the personal information of the names, addresses and signatures of petition signatories, see Ontario Order MO-1506, [2002] O.I.P.C. No. 14 at para. 24.

it is the type of information commonly found in a telephone book, online directory or land title search. This information is even less sensitive now decades later.

[60] The Ministry states that the issue before the EAB relates to a decision to approve restoring the creek to its original course. However, the applicant is attempting to determine historical land and use water flow patterns, in hopes that they will show him that the Ministry has made errors in how it has handled its management of Robbins Creek or that there will be some information that assists him in challenging the Ministry's decision to change the flow of the creek. While it is not apparent to me how the withheld complaint information will assist the applicant in challenging the Minister's decision to change Robbins Creek, the information at issue is dated and disclosure of identifying complaint information will disclose some land and water flow history to him. Given this, combined with the absence of circumstances that disclosure of the withheld information would be unreasonable, I find that s. 22 does not apply to the withheld information.

Should I now invite the third parties to provide submissions?

[61] The Ministry submits that if I consider ordering disclosure of the withheld information, it is appropriate to permit third parties to make submissions with respect to their privacy interests in this matter.²¹ Since the objective of this inquiry is to consider whether the withheld information must be disclosed, I understand the Ministry's submission to be that the third parties should be provided the opportunity to provide submissions *if* my preliminary view based on the materials before me in this inquiry is that the information ought to be disclosed to the applicant. The Ministry does not specify which of the approximately 80 third parties who are identifiable in the records should be invited to participate in this inquiry.

[62] Section 23(2) of FIPPA authorizes the Ministry to give written notice to a third party if it intends to withhold a record containing personal information of the third party under ss. 21 or 22.²² That is to say it is the Ministry's responsibility to ensure third party notice is given if the Ministry deems it to be necessary. It is also incumbent on the Ministry to do so before an inquiry begins, not afterwards or based on the outcome of the inquiry. This notice must state that the third party may make written representations to the Ministry explaining why the information should not be disclosed.²³ However, in this case, the Ministry chose to not give notice under s. 23.

[63] Further, it also did not request that the OIPC give notice to the third parties under s. 54(b) of FIPPA at the time the Notice of Written Inquiry was issued.

²¹ In the conclusion of the Ministry's initial submissions at para. 4.31.

²² Section 23(1) requires the public body to give notice to the third party if it intends to give access to the record.

²³ Section 23(3)(c) of FIPPA.

If the Ministry thought notice to the third parties was appropriate at the inquiry, it should have asked that the OIPC give notice to affected third parties at the time the Notice of Written Inquiry was issued.²⁴ Further, it could have – but did not – adduce evidence from third parties.

[64] The Ministry's submission that the third parties should receive an opportunity to provide submissions at this juncture would prejudice the applicant due to the additional delay created by seeking submissions from the third parties at this late stage. It is also problematic because it would result in another opportunity to add further evidence to bolster the position that s. 22 applies to the information after the opportunity to provide evidence and submissions has ended.

[65] The result of the timing of the Ministry's submissions on this point, if accepted, would cause prejudice to the applicant. That is not to say that I would not exercise my authority under FIPPA to invite the third parties to provide submissions at a late stage in the proceedings if I determined that the prejudice to a third party from not being invited to provide submissions exceeded the prejudice to the applicant. However, this would be an unusual case and it is not the case here. The content and context of the withheld information in this case includes that most of the information is identifying information of people in relation to not particularly sensitive information (*i.e.* address information, etc.), the information is from a relatively long time ago (approx. 18 to 50 years), there are a significant number of third parties who would have to be contacted about a small amount of personal information, some of the information is already known by the applicant, and it is apparent from the records that much of the information was disclosed to others at the time when the records were drafted. In my view, the prejudice to the applicant, and to a lesser extent the time and cost to provide notice to 80 people (many of whom may have moved or may no longer be living, considering the age of the information), exceeds the prejudice to the third parties for not receiving notice of this inquiry. For the reasons above, I have decided to not invite the third parties to provide submissions at this time.

CONCLUSION

[66] For the reasons given, under s. 58 of the Act, I order that the Ministry is:

- a) required to refuse to disclose to the applicant under s. 22 of FIPPA the information that I have highlighted in a copy of records that will be sent to the Ministry along with this decision; and

²⁴ A similar situation was addressed, and there is similar commentary, in Order 01-26.

-
- b) required to give the applicant access to the information at issue, subject to the information identified in (a), by **October 31, 2014**, pursuant to s. 59 of FIPPA. The Ministry must copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records it provides to the applicant.

September 18, 2014

ORIGINAL SIGNED BY

Ross Alexander, Adjudicator

OIPC File No.: F13-52271