



OFFICE OF THE
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Order F15-54

UNIVERSITY OF VICTORIA

Celia Francis
Adjudicator

September 30, 2015

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Summary: UVic denied the applicant access to a record of the results of a workplace investigation into allegations against a third party, on the grounds that its disclosure would be an unreasonable invasion of the third party's privacy under s. 22(1) of FIPPA. The Adjudicator found that s. 22(1) applies to the entire record and confirmed UVic's decision to deny access to it.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 4(2), 22(1), 22(3)(d) & (g), 22(2)(c), (f), (h), 22(5).

Authorities Considered: **B.C.:** Order F15-29, 2015 BCIPC No. 32 (CanLII); Order F12-08, 2012 BCIPC 12 (CanLII); Order 01-07, 2001 CanLII 21561 (BC IPC); Order 01-53, 2001 CanLII 21607 (BC IPC); Order F15-03, 2015 BCIPC 3 (CanLII); Order F15-11, 2015 BCIPC 11 (CanLII); Order F08-02, 2008 CanLII 1645 (BC IPC); Order F14-10, 2001 CanLII 21561 (BC IPC); Order 00-53, 2000 CanLII 14418 (BC IPC).

INTRODUCTION

[1] This case flows from the applicant's request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for access to the results of a workplace investigation that the public body, the University of Victoria ("UVic"), conducted. UVic denied the applicant access to the responsive record under s. 22(1) of FIPPA, on the grounds that its disclosure would be an unreasonable invasion of the privacy of another individual ("third party").

[2] The applicant requested that the Office of the Information and Privacy Commissioner (“OIPC”) review UVic’s decision to deny access to the record. Mediation did not resolve the request for review and the matter proceeded to inquiry.

ISSUE

[3] The issue in this case is whether, under s. 22(1) of FIPPA, UVic is required to deny the applicant access to the responsive record. The applicant has the burden under s. 57(2) of FIPPA of proving that disclosure of the record would not be an unreasonable invasion of third-party privacy.

DISCUSSION

Approach to applying section 22(1)

[4] The approach to applying section 22(1) of FIPPA has long been established. See, for example, Order F15-03:

Numerous orders have considered the approach to s. 22 of FIPPA, which states that 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.” This section only applies to “personal information” as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party’s personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, 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.¹

Record in dispute

[5] The record in issue in this case comprises information on the results of UVic’s investigation into allegations about the third party’s conduct in the workplace.

¹ 2015 BCIPC 3 (CanLII), at para. 58.

Section 22(1) analysis

Is the information “personal information”?

[6] FIPPA defines “personal information” as recorded information about an identifiable individual, other than contact information.² UVic argues that the record consists of information about the third party and is thus “personal information”.³ The applicant did not explicitly address this issue although she did acknowledge that the record was about the third party.

[7] My review of the record reveals that it consists almost entirely of information about an identifiable individual – the third party who was the subject of the investigation. There is a small amount of information about other identifiable individuals, one of whom is the applicant. I find that the information in question is “personal information”.

Does section 22(4) apply?

[8] Section 22(4) of FIPPA sets out a number of situations in which disclosure of personal information is not an unreasonable invasion of third-party privacy. UVic argued that none of the provisions in s. 22(4) applies in this case.⁴ The applicant did not deal with this issue.

[9] There is no indication in the material before me that s. 22(4) has any relevance in this case. I find that it does not apply.

Presumed unreasonable invasion of third-party privacy – s. 22(3)

[10] The next step is to consider whether disclosure of the information in issue is presumed to be an unreasonable invasion of a third party’s personal privacy. The relevant provisions in this case are these:

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,

...

² Contact information is defined 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.” See Schedule 1 of FIPPA for this definition.

³ Paragraph 7, UVic’s initial submission.

⁴ Paragraph 8, UVic’s initial submission.

- (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party

[11] *Employment history* – UVic said that the record contains information created in the course of a workplace investigation. In UVic's view, the record consists entirely of the third party's employment history and s. 22(3)(d) applies to it.⁵ The applicant acknowledged that the record was about the third party's employment history.⁶

[12] The record contains a number of allegations about the third party's conduct in the workplace. It sets out the third party's responses to those allegations, as well as evidence, statements, findings and conclusions of the investigation. Past orders have found that this type of information is captured by s. 22(3)(d).⁷ I find that s. 22(3)(d) of FIPPA applies to the third-party personal information in the record, so its disclosure is presumed to be an unreasonable invasion of third-party privacy.

[13] *Personal evaluations* – UVic argued that s. 22(3)(g) applies to those portions of the record that constitute evaluative comments about the third party.⁸ The applicant did not address this issue.

[14] Some of the information in the record consists of evaluative comments by the investigators about the third party's behaviour in the workplace and about his responses to the allegations.⁹ Previous orders have found that s. 22(3)(g) applies to this type of information.¹⁰ I find that the information in question falls under s. 22(3)(g) of FIPPA and its disclosure is therefore presumed to be an unreasonable invasion of third-party privacy.

Relevant circumstances – s. 22(2)

[15] The presumption that disclosure of the withheld information would be an unreasonable invasion of personal privacy can be rebutted. Public bodies must consider all relevant circumstances in determining whether disclosure of personal information is an unreasonable invasion of privacy. The following three relevant circumstances arise in this case:

⁵ Paragraphs 9-13, UVic's initial submission.

⁶ Paragraph 5, applicant's submission.

⁷ See for example, Order F14-10, 2014 BCIPC No. 12 (CanLII); Order 01-07, 2001 CanLII 21561 (BC IPC); Order 01-53, 2001 CanLII 21607 (BC IPC); Order F15-11, 2015 BCIPC 11 (CanLII).

⁸ Paragraphs 12-13, UVic's initial submission.

⁹ See, for example, the last paragraph of p. 8 and the top half of p. 9 of the record in dispute.

¹⁰ See, for example, Order F14-10, 2014 BCIPC No. 12 (CanLII); Order 01-07, 2001 CanLII 21561 (BC IPC).

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

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

(f) the personal information has been supplied in confidence,

...

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

...

[16] *Fair determination of applicant's rights* – The applicant said she reported some incidents to the Victoria Police Department (“VicPD”) and to UVic. She feels that the record would “support” her case with the VicPD and an application to the Crime Victim Assistance Program.¹¹ UVic argued that s. 22(2)(c) does not apply here, saying, among other things, that the applicant has not explained the nature of any relevant proceeding.¹²

[17] Previous orders have held that s. 22(2)(c) only applies if all of the following circumstances are met:

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.
4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.¹³

[18] Although the applicant may be pursuing, or contemplating pursuing, a claim under the Crime Victim Assistance Program, she did not explain how the requested information in the record might have any bearing on, or significance to, any such claim. Nor did she explain how it would be necessary for any hearing

¹¹ Paragraphs 1 & 5, applicant's submission.

¹² Paragraphs 5-9, UVic's reply submission.

¹³ Order 01-07, 2001 CanLII 21561 (BC IPC).

in connection with such a claim. These things are also not obvious from the information itself. I find that s. 22(2)(c) does not apply to the information in dispute.

[19] *Supplied in confidence* – UVic said that it conducted the investigation in confidence, in keeping with its practice in such investigations. It said that it has also kept the record and its contents confidential and that only a handful of specified individuals have had access to the record.¹⁴ The applicant did not deal with this factor.

[20] I am satisfied from the affidavit evidence before me that the information in the record was supplied, and kept, in confidence. I also note that the record is marked “Personal and Confidential”. I find that s. 22(2)(f) applies in this case, favouring withholding of the information in issue. This finding is in keeping with previous orders dealing with the issue of confidentiality in workplace investigations.¹⁵

[21] *Unfair damage to reputation* – UVic argued that disclosure of the information in the record may unfairly damage the third party’s reputation, given the nature of the information in issue and the fact that the investigation and its outcome were confidential.¹⁶ As above, the applicant did not address this factor.

[22] The record concerns allegations about the third party’s conduct in the workplace. In light of its character and past orders on this issue, I consider that disclosure of the information in issue could unfairly damage the third party’s reputation.¹⁷ I find that s. 22(2)(h) applies in this case and favours withholding of the information in dispute.

Is the presumption rebutted?

[23] I conclude that the ss. 22(3)(d) and (g) presumptions apply to the third-party personal information in issue in this case. I also find that s. 22(2)(c) does not apply here and that the other two relevant circumstances, ss. 22(2)(f) and (h), favour withholding the third-party personal information in issue. As a result, I find that the presumptions under ss. 22(3)(d) and (g) regarding the third-party personal information have not been rebutted.

¹⁴ Paragraph 16, UVic’s initial submission; paras. 2-5, Meyers affidavit.

¹⁵ See, for example, Order 01-07, 2001 CanLII 21561 (BC IPC), and Order F08-02, 2008 CanLII 1645 (BC IPC).

¹⁶ Paragraph 18, UVic’s initial submission.

¹⁷ See, for example, Order 00-53, 2000 CanLII 14418 (BC IPC), which found that s. 22(2)(h) applied to performance evaluation information.

Is it reasonable to sever under s. 4(2)?

[24] Section 4(2) of FIPPA states that, where it is reasonable to sever excepted information from a record, an applicant has the right of access to the remainder. I will now consider whether it is reasonable to sever the third-party personal information from the record in dispute here and disclose the applicant's personal information to her.

[25] UVic acknowledged that a "limited amount" of the information in the record is the applicant's personal information. However, it argued, this information is also the third party's personal information, given its context. UVic argued that the applicant's personal information is, moreover, "inextricably intertwined" with the third party's personal information, such that disclosure of the applicant's personal information would be an unreasonable invasion of the third party's privacy.¹⁸

[26] A number of orders have considered the issue of joint or "inextricably intertwined" personal information of two or more individuals. They have generally found that it is not reasonable to separate an applicant's personal information from a third party's personal information in such cases and that disclosing the joint personal information would be an unreasonable invasion of third-party privacy.¹⁹

[27] While there is a small amount of information about the applicant in the record in this case, it appears in the context of workplace matters involving the third party. The applicant's personal information is inextricably intertwined with the third party's personal information and it would not, in my view, be possible to disclose the applicant's own personal information to her without also disclosing the personal information of the third party. I noted above that disclosure of the third party's personal information to the applicant would be an unreasonable invasion of the third party's privacy. I find that it is not reasonable to sever the third party's personal information from the record in dispute and disclose the remainder to the applicant.

Summary under s. 22(5)

[28] Under s. 22(5) of FIPPA, a public body must create a summary of an applicant's personal information, where it was provided in confidence, unless the summary cannot be prepared without revealing the identity of a third party who provided the information in confidence.

[29] UVic argued that it is not possible to create a summary of the applicant's personal information without revealing the identity of individuals who supplied the

¹⁸ Paragraphs 20-23, UVic's initial submission.

¹⁹ See, for example, Order F14-10, 2001 CanLII 21561 (BC IPC), Order F08-02, 2008 CanLII 1645 (BC IPC), and Order 01-07, 2001 CanLII 21561 (BC IPC).

personal information in confidence.²⁰ Given my finding above that the information in this case was supplied in confidence, I agree with UVic on this point.

Conclusion on s. 22(1)

[30] I found above that ss. 22(3)(d) and (g) apply to the third-party personal information in the record in dispute. I also found that s. 2(2)(c) does not apply, that ss. 22(2)(f) and (g), do apply, favouring withholding the information in issue, and that the s. 22(3) presumptions regarding the third-party personal information are not rebutted in this case. The applicant has not met her burden of proof under s. 57(2) of FIPPA and is not entitled to have access to the third-party personal information in issue here.

[31] I also found that it is not possible to disclose the applicant's personal information without unreasonably invading third-party personal privacy, given that the applicant's personal information is inextricably intertwined with third-party personal information. I further found that it is not possible to provide the applicant with a summary of her personal information under s. 22(5) of FIPPA.

[32] I find that s. 22(1) applies to the entire record and the applicant is not entitled to any of the information in dispute in this case.

CONCLUSION

[33] Under s. 58(2)(c) of FIPPA, I require the University of Victoria to refuse the applicant access to the record in dispute in this case, under s. 22(1) of FIPPA.

September 30, 2015

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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²⁰ Paragraphs 20-23, UVic's initial submission.