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Order F16-33

MINISTRY OF FINANCE

Elizabeth Barker
Senior Adjudicator

July 13, 2016

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Summary: A journalist requested information about active grievances filed by employees of the Ministry of Health under the collective agreement governing their workplace. The Public Service Agency, which is part of the Ministry of Finance, responded to his request. The Ministry disclosed the number of active grievances for the requested period, but it refused to disclose any other information on the basis that to do so would be an unreasonable invasion of third party personal privacy under s. 22 of FIPPA. The information in dispute was contained in a table. The adjudicator determined that the majority of the information in the table would identify the grievors, so it was their personal information and disclosure would be an unreasonable invasion of their personal privacy under s. 22. However, severing under s. 4(2) was possible, and the Ministry was ordered to disclose specific information that would not permit identification of the grievors.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 4(2), 22, 22(3)(d).

Authorities Considered: B.C.: Order 211-1998, 1998 CanLII 2061 (BC IPC); Order 01-53, 2001 CanLII 21607 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC); Order 03-41, 2003 CanLII 49220 (BC IPC); Order F15-60, 2015 BCIPC 64.

INTRODUCTION

[1] This inquiry concerns a journalist's request for information about grievances filed by Ministry of Health employees. The Public Service Agency, which is part of the Ministry of Finance ("Ministry"), responded to his request.

The applicant specified that he was only interested in grievances that were active during a particular one month time frame, and he wanted the date each grievance was filed, the division of the Ministry of Health involved and the nature and status of the grievance. The applicant specifically said that he did not want any personal identifiers.

[2] The Ministry responded by informing him that there were 11 active grievances by Ministry of Health employees for the time frame in question. However, it refused to disclose any further information on the basis that to do so would be an unreasonable invasion of third party personal privacy under s. 22 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[3] The applicant disagreed with the Ministry’s decision and asked for a review by the Office of the Information and Privacy Commissioner (“OIPC”). Investigation and mediation did not resolve the matter, and the applicant requested that it proceed to inquiry. Both parties provided inquiry submissions.

ISSUE

[4] The issue to be decided in this inquiry is whether the Ministry is required under s. 22 of FIPPA to refuse the applicant access to information in the requested record. Section 57(2) of FIPPA places the onus on the applicant to prove that disclosure of personal information contained in the record would not unreasonably invade third party personal privacy under s. 22 of FIPPA.

DISCUSSION

[5] **Background** – The information in dispute in this case is about grievances filed by Ministry of Health employees who are members of the BC Government and Service Employees’ Union. The collective agreement governing their workplace is the Public Service Agreement (formerly the “Master” Agreement).

[6] **The Record** – The record in dispute is a one page table with information about grievances that were active during the requested one month time frame. The Ministry is refusing to disclose any part of the table to the applicant, including column headings. However, in its submissions and the supporting affidavit evidence, the Ministry discloses the fact that the table pertains to 11 grievances and includes the grievors’ employee numbers, the relevant provisions of the collective agreement, the dates the grievances were filed and the date of last action taken on each.¹ The table contains 11 columns in total. It does not contain anyone’s name.

¹ The Ministry’s initial submissions, paras. 4.11, 4.18 and 4.19; Senior Labour Relations Specialist’s affidavit at paras. 7 and 14.

[7] **Preliminary matter** - In his initial submissions, the applicant raises a new issue that was not in the Notice of Inquiry. He submits that s. 25 of FIPPA applies in this case and overrides s. 22. The Ministry says that s. 25 is not at issue in this inquiry, so it did not reply to the applicant's submissions regarding it.²

[8] Past orders have said parties may only introduce new issues at the inquiry stage if they request and receive permission from the OIPC to do so. In this case, the applicant did not request permission to add s. 25, and he does not explain why he did not raise the issue at an earlier stage.³ Therefore, I have decided not to permit him to add s. 25 as an issue.

[9] Furthermore, even if the s. 25 issue was properly before me, I would have no difficulty concluding that it would not have any application here. Section 25 overrides all of FIPPA's exceptions to disclosure, and consequently there is a high threshold before it applies. Section 25(1)(a) applies where there is an imminent "risk of significant harm" to the environment or to human health or safety. The information in dispute here is plainly not about the matters described in s. 25(1)(a). Further, s. 25(1)(b) only applies where disclosure is clearly in the public interest and the information concerns a matter justifying mandatory disclosure. As former Commissioner Denham said in Investigation Report F16-02: "There must be an issue of objectively material, even significant, public importance, and in many cases it will have been the subject of public discussion...disclosure must be plainly and obviously required based on a disinterested, reasonable, assessment of the circumstances."⁴ In my view, the information at issue here does not even remotely approach that level of magnitude or broader public significance.

[10] **Disclosure Harmful to Personal Privacy (s. 22)** – The Ministry is withholding all of the information at issue under s. 22. Numerous orders have considered the application of s. 22, and I will apply those same principles here.⁵

Personal information

[11] The first step in the s. 22 analysis is to determine if the information in dispute is personal information. Personal information is defined as "recorded information about an identifiable individual other than contact information". 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,

² However, the Ministry requests the opportunity to make submissions regarding s. 25, if that issue is considered.

³ He did not mention it in his request for review.

⁴ Investigation Report F16-02, 2016 BCIPC 36, at p. 36.

⁵ See for example, Order 01-53, 2001 CanLII 21607 (BC IPC), p. 7.

business telephone number, business address, business email or business fax number of the individual”.⁶

[12] The Ministry says that it is concerned that disclosure of the information in the table would identify the employees who filed the grievances.⁷ It submits that the grievors can be re-identified by combining the table information with information from other sources. For instance, the Ministry submits that if it is revealed that a grievance was filed regarding a specific event (i.e., termination, sick leave, etc.) in a particular department during the time period captured by the list, then other employees in the same department could identify the grievor.⁸ The Ministry also provides the number of employees working in each department at the time the grievances were filed, and it ranges from 12 to 38 employees.

[13] The applicant disputes that the information is personal information. He says that it is not possible to guess the identity of anyone involved in the grievances based on the information he requested.

[14] I find that each of the columns of information – in isolation – would not provide enough information to allow one to identify a grievor. However, when certain columns are viewed in combination it would be possible for someone with knowledge of the grievor’s work place to identify the grievor. Even if the applicant has no personal knowledge of the departments where the grievances were filed, it is possible that someone who does, such as the grievors’ colleagues, would be a source of such information. The departments were relatively small at the time the grievances were filed, so that makes it more likely, in my view, that other Ministry of Health employees will be able to identify the grievors.

[15] Therefore, I find that with only two exceptions, the information in the table is personal information. The two exceptions are the column headings and the information in columns 7-10, which are generic and pertain equally to every grievance and they reveal nothing about identifiable individuals. Therefore, they are not personal information and s. 22 does not apply to them.

Section 22(4)

[16] The next step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4) because if it does, disclosure would not be an unreasonable invasion of personal privacy.

⁶ See Schedule 1 of FIPPA for these definitions.

⁷ Ministry’s initial submissions at para. 4.12.

⁸ The Ministry cites several orders where information that in isolation did not identify someone could possibly do so when combined with other information, so it was found to be personal information: Order 03-41, 2003 CanLII 49220 (BC IPC); Order F15-60, 2015 BCIPC 64.

[17] The Ministry submits that s. 22(4) does not apply in this case. The applicant submits that ss. 22(4)(c), (d), (e) and (f) apply. Those sections state:

- 22(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
- ...
- (c) an enactment of British Columbia or Canada authorizes the disclosure,
 - (d) the disclosure is for a research or statistical purpose and is in accordance with section 35,
 - (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,
 - (f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,

[18] The applicant's submissions regarding s. 22(4) are as follows:

Many of the workers in this ministry are covered by collective bargaining agreements. The disclosure would reveal aspects of how those agreements are put into action, with regard to settling disputes. The disclosure would reveal how employees are remunerated. As a journalist, I am always seeking statistics and facts.

And, finally, the right to know stems from the Charter of Rights and Freedoms' section 2(b), freedom of the press and other media of communication. Provincially, section 25 of FIPPA overrides section 22.⁹

[19] Although the applicant does not explicitly say how he believes s. 22(4)(c) applies, I infer that he means that s. 2(b) of the *Canadian Charter of Rights and Freedoms* ("Charter") and s. 25 of FIPPA are the enactments that authorize disclosure of the personal information in this case.

[20] I disagree that s. 22(4)(c) applies here. Section 2(b) of the *Charter* says that everyone has the "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication", but it does not authorize disclosure of personal information. Further, as discussed above, s. 25 requires disclosure of information in certain specific circumstances, which I am not satisfied exist here.

[21] I also find that s. 22(4)(d) does not apply in this case. There is nothing to suggest that disclosure is for a research or statistical purpose in accordance with s. 35. Section 35 of FIPPA authorizes the disclosure of personal information for a research purpose if a number of conditions are met, and there is no evidence that any of those conditions have been met in this case.

⁹ Applicant's submissions at paras. 11-12.

[22] I have also considered ss. 22(4)(e) and (f). Previous orders have found that s. 22(4)(e) applies to information such as the name, title, remuneration and duties of public body employees.¹⁰ The information in dispute is not about such matters, so s. 22(4)(e) does not apply. In addition, I find that s. 22(4)(f) does not apply because the information is clearly not about the financial and other details of a contract to supply goods or services to a public body.

[23] In summary, I find that the personal information does not fall into any of the types of information listed in s. 22(4).

Section 22(3) presumptions

[24] The third step is to determine whether any of the presumptions in s. 22(3) apply, in which case disclosure is presumed to be an unreasonable invasion of third party privacy.

[25] The Ministry submits that s. 22(3)(d) applies. Section 22(3)(d) says that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information "relates to employment, occupational or educational history." The Ministry submits that the information in dispute relates to the employment history of third parties. The applicant makes no submissions on this point.

[26] The personal information in the table reveals that certain individuals filed grievances. I find that the personal information relates to the employment history of the grievors, so s. 22(3)(d) applies. Therefore, disclosure of the withheld information is presumed to be an unreasonable invasion of the grievors' personal privacy.¹¹

Section 22(2) relevant circumstances

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

[28] The following parts of s. 22(2) are relevant here:

22(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third

¹⁰ See for example, Order 01-53 at para. 40; Order F10-21, 2010 BCIPC 32 (CanLII) at paras. 22-24.

¹¹ In Order 211-1998, 1998 CanLII 2061 (BC IPC), former Commissioner Flaherty also found that s. 22(3)(d) applied to grievance/arbitration information.

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,
- ...
- (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...

Section 22(2)(a) - Disclosure desirable for public scrutiny

[29] The applicant submits that public scrutiny of the personal information is desirable for the following reasons:

Employees of the Ministry of Health are publicly employed, paid with citizens' tax dollars. A great deal of funds and emotions are entrusted with these employees, who are responsible for the wellbeing of people of all ages. Citizens have a right to know whether the employees are content (or not) in their workplaces and whether their workplaces are operated in a safe and healthy manner, under all applicable laws.

Citizens have a right to know the process of dealing with and settling workplace grievances, including how many there are, what they are about and where they have happened. Public scrutiny would help the welfare of all parties involved and, potentially, lead to fewer grievances.

...

In Ontario OIPC Order P-3461, it was said: "a key question is whether there is a relationship between the record and the Act's central purpose of shedding light on the operations of government, with the information having to serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices."¹²

[30] The Ministry says that it considered s. 22(2)(a) but determined that it did not weigh in favour of disclosure. Specifically, the Ministry explains that it does not think that disclosure is desirable for the purpose of subjecting the Ministry's activities to public scrutiny, or that disclosure would enhance public understanding to the extent that it would warrant invading the personal privacy of third parties.

[31] I find that s. 22(2)(a) is not a factor that weighs in favour of disclosure of the personal information in this case. The information relates to a small number

¹² Applicant's submissions at paras. 27-34.

of grievors and their particular grievances, and it reveals nothing about patterns in the Ministry of Health's treatment of its employees and their grievances. Further, contrary to what the applicant supposes, the information contains no specific details about how the Ministry of Health responds to grievances, whether its employees are content in their workplaces in general, or whether their workplaces are operated in a safe and healthy manner under all applicable laws. In my view, it is not apparent how giving the applicant access to these 11 grievors' personal information would be desirable for the purpose of subjecting the Ministry of Health's activities to public scrutiny or would add anything to the public's knowledge of how it deals with its employees and their grievances.

*Section 22(2)(f) - Information supplied in confidence and
Section s. 22(2)(h) - Disclosure may unfairly damage reputation*

[32] The Ministry submits that both ss. 22(2)(f) and (h) are relevant in this case. The applicant makes no submissions regarding ss. 22(2)(f) and (h).

[33] The Ministry says that it has a practice of treating grievance information in a confidential manner, as this type of information is clearly sensitive third party personal information.¹³ It cites Order 211-1998¹⁴ where former Commissioner Flaherty said that ss. 22(2)(f) and (h) were relevant and weighed against disclosure of the names of City of Vancouver employees who had filed grievances.

[34] In my view, personal information about matters related to workplace complaints and concerns are invariably considered - by those who provide them and by those who receive them - to be sensitive personal information that is supplied in confidence. There is nothing here to suggest that it is otherwise with respect to these grievances. Therefore, I am satisfied that the grievors' identities and the nature of their complaints/grievances would have been supplied by the grievors and their union to the Ministry in confidence during the grievance process. This is a factor that weighs against disclosure of the personal information.

[35] As for s. 22(2)(h), the Ministry did not explain how disclosure of the personal information may unfairly damage anyone's reputation. I find, however, that disclosure may very well have this impact in cases where the grievance is about disciplinary matters or termination of employment. Being fired or disciplined at work carries a stigma and can impact an individual's future job prospects. However, when the grievance is about something like pay discrepancies or leave entitlement, it is not apparent how or why disclosure would unfairly damage a grievor's reputation. In summary, I find that disclosure of

¹³ The Ministry did not explain how the information in the table, which is evidently derived from other records and sources, was "supplied" in confidence to the Ministry.

¹⁴ Order 211-1998, 1998 CanLII 2061 (BC IPC).

the personal information that relates to firings and disciplinary action may unfairly damage the grievors' reputations and that this weighs against disclosure of that information only.

Size of department

[36] The Ministry also submits that a relevant consideration in this case is the size of the Ministry of Health departments referenced in the table. I have already determined above that the relatively small size of the departments would make it easier to identify the grievors, thus making the withheld information personal information. However, it is not apparent, and the Ministry does not explain, why the size of the workplace several years ago when the grievances were filed is otherwise relevant.

Conclusion - s. 22

[37] Having considered the relevant circumstances above, I am not satisfied that the presumption under s. 22(3)(d) has been rebutted. In my view, disclosure of the information in this case that identifies the grievors would be an unreasonable invasion of their personal privacy under s. 22. Therefore, I find that s. 22(1) requires that the Ministry refuse to disclose the personal information in dispute.

Severing under s. 4(2)

[38] 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 have considered whether it is reasonable to sever some of the information from the table in order to disclose the rest of it to the applicant. In my view, if the Ministry were to withhold the grievors' employee numbers, all dates and the department names, the balance of the table could be disclosed without any risk of identifying the grievors. This would allow the applicant to know the nature of the grievances that were active during the time period he specified without any risk of identifying the grievors. For clarity, I have highlighted in a copy of the table that accompanies the Ministry's copy of this order, the only information that the Ministry is authorized to refuse to disclose to the applicant under s. 22.¹⁵

CONCLUSION

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

¹⁵ The applicant will see more than 11 lines of information because some of the grievances involve more than one article of the collective agreement.

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1. The Ministry is required by s. 22 of FIPPA to refuse to disclose to the applicant the information highlighted in the copy of the table that accompanies the Ministry's copy of this order.
 2. The Ministry is required to give the applicant access to the balance of the information in the table on or before August 25, 2016. The Ministry must concurrently copy the OIPC's Registrar of Inquiries on its cover letter to the applicant, together with a copy of the record.

July 13, 2016

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

OIPC File No.: F14-58822