



OFFICE OF THE
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COMMISSIONER
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Order F17-26

CITY OF VANCOUVER

Chelsea Lott
Adjudicator

May 9, 2017

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Summary: A third party objected to the City's decision to disclose the third party's name and the amount of severance he received from the City on the basis that s. 22 (harm to personal privacy) applied. The third party argued that the payment was not "remuneration" within the meaning of s. 22(4)(e) because it was not severance pay. The adjudicator held that the payment was a form of remuneration, and, because it came within the scope of s. 22(4)(e), it could not be withheld under s. 22.

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

Authorities Considered: B.C.: Investigation Report F16-02, 2016 BCIPC 36; Order 01-53, 2001 CanLII 21607 (BC IPC); Order F09-15, 2009 CanLII 58553 (BC IPC); Order F11-33, 2011 BCIPC 41 (CanLII); Order No. 46-1995, [1995] BCIPCD No 19 (BC IPC).

INTRODUCTION

[1] An applicant requested that the City of Vancouver (the City) provide a list of former employees who received severance pay in a certain year, as well as the amounts of their severance pay. The City notified the third parties whose personal information was contained in the responsive record pursuant to s. 23 of the *Freedom of Information and Protection of Privacy Act* (FIPPA). One of the notified third parties objected to the disclosure on the basis that it would be an unreasonable invasion of his personal privacy to disclose his information (s. 22). However, the City determined that s. 22 did not apply to the information and decided to give the applicant access to the information.

[2] The third party disagreed with the City's decision and requested a review by the Office of the Information and Privacy Commissioner (OIPC). Mediation failed to resolve the matter and the third party requested an inquiry. The applicant was provided notice and invited to participate in the inquiry pursuant to s. 54(b). The applicant, the City, and the third party all provided submissions.

[3] This Order is issued concurrently with Orders F17-24 and F17-25. All three Orders arise from requests for review of the City's decision to disclose severance information, but by different third parties. The Orders relate to the same record, and involve the same applicant. Section 22 is the only exception at issue in the Orders. Given the overlap in issues, arguments and evidence in the three inquiries, much of what has been written in this order is repetitive of the other two Orders.

ISSUE

[4] The issue to be decided in this inquiry is whether the City is required under s. 22 of FIPPA to refuse to disclose the third party's personal information. Section 57 of FIPPA places the burden 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.

DISCUSSION

Information in Dispute

[5] The information in dispute is contained in a table which lists the names of several former employees and the amount of severance they received. The table has been disclosed to the applicant except for information about three individuals. The information about one of those individuals is at issue in this inquiry.

Preliminary Matter

[6] In his initial submissions, the applicant raises two new issues which were not in the Notice of Inquiry. First, he complains that the City took too long to respond to his request, which amounts to a complaint about the City's duty to assist under s. 6(1).¹ He also submits that s. 25(1)(b) of FIPPA applies to the withheld information.

Section 6(1) – Duty to assist

[7] The OIPC's usual practice regarding complaints that a public body failed in its duty to assist under s. 6 of FIPPA, is to investigate and dispose of all

¹ Public bodies have a duty under sections 6(1) and 7 of FIPPA to respond without delay to an information request.

complaints without an inquiry. However, this process has been sidestepped because the applicant raised his complaint apparently for the first time in his inquiry submissions.

[8] The applicant has had ample time to make a complaint to the OIPC prior to the inquiry.² The applicant provides no explanation for the delay, nor did he seek consent from the Registrar to add the issue to the inquiry. In addition, the complaint is between the applicant and the City, and the third party has no interest in its outcome. In my view, the prejudice to the third party, caused by the inquiry's delay for an issue he has no interest in, outweighs any prejudice to the applicant. I conclude that it would be unfair to delay the inquiry in order to obtain submissions on the issue. In any event, if the applicant remains dissatisfied with the City's response to his access request, he has recourse to make his complaint directly to the OIPC's intake unit.

Section 25(1)(b) – Clearly in the public interest

[9] I will address s. 25(1)(b), despite the issue being raised late by the applicant, as this is plainly not a case in which s. 25(1)(b) mandates the disclosure of the information in dispute. Further, I do not require submissions from the other parties in order to dispose of it.

[10] Section 25(1)(b) requires a public body to disclose information without delay if it is "clearly in the public interest." 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. It is useful here to recall that, as I said in the Mount Polley Report, disclosure must be plainly and obviously required based on a disinterested, reasonable, assessment of the circumstances.³

[11] I will repeat the applicant's brief argument on the application of s. 25(1)(b):

It's clearly in the public interest to know how tax dollars are spent. If public monies are used on severance payouts, then the public has a right to have access and to know who the beneficiary of the severance was.⁴

[12] I accept that there is a general public interest in how tax dollars are spent. However, the reasons for invoking s. 25(1)(b) must be of sufficient gravity to warrant overriding all other provisions of FIPPA, including the exceptions found in Part 2 of FIPPA. In addition, the information must be disclosed "without

² The inquiry documents indicate that the City made its decision to disclose the information in September 2015.

³ Investigation Report F16-02, 2016 BCIPC 36 at p. 36.

⁴ Applicant's initial submissions.

delay” by the public body. A general interest in how a public body spends money, without more, does not meet the high threshold for disclosure under s. 25(1)(b). There is no evidence that the City’s severance payments to former employees is the subject of public discussion or that it is of public importance, beyond general interest. This is not to say that s. 25(1)(b) could never apply to a particular severance payment, however the applicant’s suggestion that there is a blanket requirement for disclosure without delay of severance payments to public employees is untenable. The public’s general right to information about public expenditures is provided for by s. 4 of FIPPA, rather than by s. 25(1)(b).

[13] I turn now to address s. 22.

Disclosure harmful to personal privacy – s. 22

[14] Numerous orders have considered the application of s. 22 and I will apply those same principles here.⁵

Personal information

[15] The first step in applying s. 22 is to determine whether the requested information is “personal information” as that term is defined in FIPPA. FIPPA defines personal information 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, business telephone number, business address, business email or business fax number of the individual.”⁶ The information at issue in this case is about the third party, an identifiable individual, and is plainly not contact information. No one disputes that it is personal information. Therefore, I find it to be personal information within FIPPA.

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). If it does, then disclosure would not be an unreasonable invasion of personal privacy. The applicant and City argue that s. 22(4)(e) applies to the personal information at issue. That subsection states:

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

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

⁶ See Schedule 1 of FIPPA for these definitions.

[17] Several past orders have held that severance pay is encompassed within the meaning of “remuneration” in s. 22(4)(e).⁷ The rationale for including severance within the meaning of remuneration was explained by then Commissioner Flaherty:

Severance payments or agreements, whenever made, can and should be construed as “remuneration.” These are payments customarily made “in lieu of notice” for services that would have been performed during the notice period had the employer required the employee to continue work during that period. In my view, such payments constitute “remuneration” under the Act whether an agreement is reached while the employee is still employed or after he or she has left, and whether an agreement is reached before or after litigation has been commenced....⁸

[18] I agree with former Commissioner Flaherty that the path to compensation in lieu of notice, whether it be through agreement, negotiation, or litigation, is not relevant for the purpose of determining whether it is “remuneration” within s. 22(4)(e). The key consideration for the purpose of FIPPA, is whether the compensation arose as a direct result of an individual’s employment with a public body.

[19] In the present case, the third party argues that the money he received from the City was not severance pay because he “voluntarily resigned.”⁹ The third party asserts that “the City’s equipment harmed my body....” and that the money he received was “related to my medical condition.”¹⁰ He explains that he left because the City no longer “wanted to allow accommodations for my medical condition.”¹¹ The third party does not characterize the payment beyond linking it to his medical condition.¹²

[20] The applicant argues that the information comes within s. 22(4)(e). He submits that he requested information about employee compensation and did not request information about anyone’s “medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation.”¹³ He submits that there is a long precedent for disclosure of information about money paid to civil servants, although he has not cited any past Orders.

⁷ See: Order F09-15, 2009 CanLII 58553 (BC IPC), Order F11-33, 2011 BCIPC 41 (CanLII), Order No. 46-1995, [1995] BCIPCD No 19 (BC IPC).

⁸ Order No. 46-1995, *supra* at p. 4.

⁹ Third party initial submissions.

¹⁰ Third party reply submissions

¹¹ Third party reply submissions.

¹² For example, there is no evidence that the third party had made a complaint pursuant to the *Human Rights Code*, RSBC 1996, c 210, made a WorksafeBC claim or had negotiations with the City about his resignation.

¹³ Applicant initial submissions.

[21] The City has not provided any evidence or explanation about the circumstances of the third party's departure from his employment with the City. Nevertheless, I am satisfied that the City's payment to the third party was severance pay. I find support in the fact that the City decided that the information was responsive to the applicant's original request for a "list of former employees who received severance pay and the total amounts of severance pay."¹⁴ In addition, the information appears in a table which has the heading, "Severance Agreements" and under the column heading "Total Severance Amount." I presume that the City would only disclose information which, at least in its view, related to severance payments, and there is no evidence to suggest otherwise.

[22] I accept that the third party's departure from the City was related to his medical condition. However, that is not incompatible with him receiving severance pay. The third party advises that he received a "termination letter" listing justifications related to his medical condition. A termination letter clearly suggests that the third party was dismissed. As noted above, the third party states that he left because the City no longer wanted to accommodate his medical condition. In that situation, if the City would not (or could not) accommodate the third party's medical condition, then it follows that he was dismissed. If the City dismissed the third party without just cause, the City would likely be liable for severance.¹⁵ Accordingly, the fact that the third party's resignation was related to his medical condition is entirely consistent with him receiving severance pay.

[23] I have also considered whether the payment could have been for injury to dignity, feelings or self-respect pursuant to the *Human Rights Code*, as opposed to remuneration in lieu of notice.¹⁶ However, there is simply no evidence to indicate the payment was for damages other than compensation for lost wages.

[24] Based on the evidence before me, I am satisfied that the City paid severance to the third party. As previously discussed, whether that payment was pursuant to an agreement or negotiation is not relevant because it is still remuneration within s. 22(4)(e). Accordingly, I consider the third party's personal information to be about his remuneration as an employee of a public body, and as such, s. 22(4)(e) applies. As s. 22(4)(e) applies, disclosure of the third party's personal information is not an unreasonable invasion of his personal privacy.

[25] Although the third party argues that s. 22(3)(a) creates a presumption against disclosure of this information, I do not need to consider its application. When s. 22(4) applies, the information cannot be withheld under s. 22, despite

¹⁴ Investigator's Fact Report.

¹⁵ Either through a collective agreement, individual employment contract or the *Employment Standards Act*, RSBC 1996, c 113.

¹⁶ RSBC 1996, c 210. Section 37(2)(d)(iii) provides for damages to compensate a person for injury to dignity, feelings and self-respect.

the application of any considerations contained in ss. 22(3) and/or (2).¹⁷ Therefore, the City is not required to refuse to disclose the information to the applicant under s. 22(1).

CONCLUSION

[26] For the reasons provided above, and pursuant to s. 58(2) of FIPPA, I confirm the City's decision to disclose the third party's personal information. As the City has not yet disclosed the third party's information, I require the City to give the applicant access to this information by June 21, 2017 concurrently with the information in Orders F17-24 and F17-25. The City must copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the record.

May 9, 2017

ORIGINAL SIGNED BY

Chelsea Lott, Adjudicator

OIPC File No.: F15-62964

¹⁷ Order F11-33, 2011 BCIPC 41 (CanLII) at para. 12.