Order F19-35

BOARD OF EDUCATION OF SCHOOL DISTRICT No. 39

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Senior Investigator

October 2, 2019

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Summary: The Board of Education of School District No. 39 asked the Commissioner not to hold an inquiry because it is plain and obvious that disclosing the records in dispute would be an unreasonable invasion of third parties' privacy under s. 22 of FIPPA. The investigator found that it is not plain and obvious that s. 22 applies to all of the information in the records in dispute. As a result, she denied the Board's request that an inquiry not be held.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* ss. 56 and 22.

INTRODUCTION

The Board of Education of School District No. 39 (the Board) has asked the Commissioner to exercise his discretion to not hold an inquiry under part 5 of the *Freedom of Information and Protection of Privacy Act* (FIPPA) because it is plain and obvious that s. 22 applies to the information in dispute.

The applicant requested notes taken during interviews related to a workplace investigation. The Board disclosed the notes that the investigator took while interviewing the applicant but withheld the remaining records under ss. 19 and 22 of FIPPA.

The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Board's decision to withhold information. Mediation did not resolve the matters in dispute. The applicant requested that the matter proceed to inquiry. The Board then requested that the OIPC exercise its discretion not to hold an inquiry.

ISSUE

Should the Commissioner exercise his discretion under s. 56 of FIPPA to not hold an inquiry under part 5 of FIPPA because it is plain and obvious that s. 22 applies?

DISCUSSION

Background

The Board investigated the applicant as part of a workplace investigation about bullying and harassment. During the investigation, the investigator conducted interviews of the applicant and other School Trustees (the Third Parties).

Information in Dispute

The records in dispute are handwritten investigator's notes of interviews with Third Parties. There are over 200 pages of notes and all of them have been withheld in their entirety.

Section 56

Section 56 gives the Commissioner discretion to not hold and inquiry.

Section 56(1) of FIPPA reads as follows:

> 56(1) If the matter is not referred to a mediator or is not settled under s. 53, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

The reasons why the Commissioner might exercise his discretion not to hold an inquiry are open-ended[1]. One such circumstance is where it is plain and obvious that an exception to disclosure applies to the information in dispute. It must be clear that there is no arguable case.[2]

The burden is on the public body to show why an inquiry should not be held. The applicant does not have the same burden. However, if the applicant wishes the inquiry to go ahead, it is in their interest to provide a cogent basis on which to hold an inquiry.

In this case, the Board is asserting that an inquiry should not be held because it is plain and obvious that s. 22 applies.

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[1] Decision F08-11, 2008 CanLII 65714 (BCIPC) at para 8.
[2] *Ibid.*

I will now determine whether it is plain and obvious that s. 22 applies to the information in dispute. It is important to note that the records have been withheld in their entirety. As a result, it must be plain and obvious that s. 22 applies to all information in the records.

Section 22

Section 22 of FIPPA requires public bodies to refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy.

Past orders have discussed how s. 22 is applied.[3] I will do the same here.

Personal Information

First, it must be determined whether the information at issue is personal information. Personal information is defined in Schedule 1 of FIPPA as "recorded information about an identifiable individual other than contact information," and 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."

Much of the information in the investigator's notes consists of personal information because it is recorded information about identifiable individuals and is not "contact information." A considerable amount is third party personal information intertwined with the applicant's personal information because it is the Third Parties' thoughts and opinions about the applicant. Some of the information in the records does not appear to be personal information.

Section 22(4)

Next, one must consider s. 22(4), which identifies situations where disclosure of personal information is not unreasonable.

Neither the Board nor the applicant have made any arguments relevant to s. 22(4). I have reviewed the information in dispute and it is not clear to me that anything in s. 22(4) applies.

Section 22(3)

The next step in the s. 22 analysis is determining whether any circumstances in s. 22(3) apply.

[3] See, for example, Order 01-53, at para 8.

The Board relies primarily on s. 22(3)(d) of FIPPA which states that 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. It cites orders F14-10[4], F15-12[5] and F13-09[6] in support of its position that employee participation in a workplace investigation and the resulting interview notes constitute employment or occupational history and that the disclosure of this material gives rise to an unreasonable invasion of personal privacy.

I agree that the interview notes contain information that falls under s. 22(3)(d) of FIPPA. However this does not mean it is plain and obvious that s. 22 applies to all of the information in the records.

Section 22(2)

The next step in the s. 22 analysis is to consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosure would constitute an unreasonable invasion of a third party's personal privacy.

The Board submits that ss. 22(2)(e) and (f) are circumstances which favour withholding the information:

> 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
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> …
>
> (e) the third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence,

The Board asserts that this investigation had a devastating impact on employees, many of whom continue to experience fear and anxiety about retribution and some of whom have permanently left their employment as a result of these events. It states the employees participated in the investigation on the basis that the information they provided to the investigator was confidential.

The Board argues that disclosure of the interview notes would expose interviewees unfairly to actual and potential harm including mental distress, reputational harm, stress, fear and anxiety. It says that should the applicant be able to identify the interviewees she could seek to retaliate against them through negative public commentary and other retaliatory actions. The Board asserts that

[4] Paragraph 18.
[5] Paragraph 18.
[6] Paragraphs 27 and 28.

s. 22(2)(e) applies to an exposure to harm and is not dependent on the likelihood of that harm occurring[7].

The applicant disagrees with the Board's statements that the individuals involved fear retribution or retaliation on her part. She acknowledges commenting on and when warranted, criticizing officials in the education sector in her role as a journalist, but says she does not focus on current or former Board managers. The applicant does not believe such fears should override her rights under FIPPA.

I agree that it is arguable that s. 22(2)(e) applies.

Regarding s. 22(2)(f), the Board states the Third Parties were assured that the information they provided to the investigator would be treated as confidential. As such, it argues that they supplied their personal information expressly in confidence.

I agree that in this case, it is not in dispute that the information the interviewees provided to the investigator was provided in confidence.

The applicant's submissions indicate that she believes s. 22(2)(a) applies. Section 22(2)(a) says:

> 22(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,

The applicant submits that her interest in pursuing the records is to confirm her belief that the investigator's findings were unduly influenced. She argues disclosure of the records is both in her own and in the public interest because the findings may have been manipulated by parties acting on behalf of the former government or by those working under its direction.

The Board asserts that this argument is purely speculative. It states the respondent's interest in the notes is personal and related to the findings against her of bullying and harassment rather than any public interest.

As set out in Order F05-18, the principle behind s. 22(2)(a) is that where disclosure of records would foster accountability of a public body, this may in

[7] Order 01-37 at paragraph 42.

some circumstances support a finding for the release of third party personal information. I have reviewed the records at issue and do not agree that disclosure of the investigator's notes is desirable for subjecting the Board to public scrutiny or how it would allow the applicant to disclose or uncover the interference she alleges.

Summary

In my view, it is not plain and obvious that s. 22 applies to the information in dispute.

While it is plain and obvious that much of the information in dispute is personal information, it is not clear to me that all of the information in the records is personal information.

I agree that there are circumstances weighing in favour of withholding the personal information. However, the fact that much of the personal information is simultaneously the applicant's and the Third Parties' personal information means that an adjudicator will need to more fulsomely consider and weigh the evidence and arguments at an inquiry.

Though it is clear the Board makes a case for the application of s. 22, this is not sufficient for the purposes of demonstrating it is plain and obvious that s. 22 applies to the records in their entirety. In my view, this matter should proceed to an inquiry.

CONCLUSION

The Board has the burden of demonstrating why the Commissioner should exercise his discretion not to hold an inquiry in this case. In my opinion, it has not met that burden. It is not plain and obvious that the Board is required to withhold the records in their entirety under s. 22 of FIPPA. Therefore, the Board's request that the Commissioner exercise his discretion under s. 56 not to hold an inquiry is denied.

Nothing in this decision reflects any opinion or decision as to the relevant merits of the parties' positions. The merits remain to be decided in the Part 5 inquiry, on the basis of the evidence and arguments the parties submit at that time.

October 2, 2019

ORIGINAL SIGNED BY

Shannon Hodge, Investigator

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