



Order F19-43

## RESORT MUNICIPALITY OF WHISTLER

Celia Francis  
Adjudicator

December 9, 2019

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**Summary:** The applicant requested access to building permits, inspection reports and other associated records related to her strata development in the Resort Municipality of Whistler (RMOW). The RMOW disclosed hundreds of pages of responsive records, withholding a small amount of information under s. 21(2) (information related to a tax) and s. 22(1) (unreasonable invasion of third-party privacy). The adjudicator found that s. 21(2) applied to one page. The adjudicator found that s. 22(1) applied to the remaining information and ordered the RMOW to withhold it. The applicant argued that s. 25(1) applied to the information in dispute but the adjudicator found it did not.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 21(2), 22(1), 25(1)(a), 25(1)(b).

### INTRODUCTION

[1] This case concerns a strata development in the Resort Municipality of Whistler (RMOW). The applicant owns a unit in the development and, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), made two requests for access to building permits, plumbing permits, inspection reports and other records related to her building. The RMOW disclosed several hundred pages of records, initially withholding information under a number of exceptions to disclosure. The applicant requested reviews of the RMOW's responses to her requests by the Office of the Information and Privacy Commissioner (OIPC).

[2] During mediation, the RMOW disclosed more information and revised the exceptions it was applying to the withheld information. Ultimately, the RMOW

decided to withhold information under s. 21(2)<sup>1</sup> and s. 22(1).<sup>2</sup> In addition, the applicant argued that the withheld information should be disclosed under s. 25(1) (public interest override). Mediation did not resolve the issues and the two matters proceeded jointly to inquiry. The OIPC received submissions from the applicant and the RMOW.

## ISSUES

[3] The issues before me are these:

1. Is the RMOW required by s. 25(1) of FIPPA to disclose the information in dispute in the public interest?
2. Is the RMOW required by ss. 21(2) and 22(1) to refuse to disclose information.

[4] Under s. 57(1) of FIPPA, the RMOW has the burden of proving that the applicant has no right of access to the information in dispute under s. 21(2). Under s. 57(2), the applicant has the burden of proving that disclosure of the personal information in dispute would not be an unreasonable invasion of third-party personal privacy under s. 22(1).

[5] Section 57 is silent as to who has the burden of proof respecting s. 25(1). Past orders have said that, in light of the absence of a statutory burden of proof, “As a practical matter, both parties should provide evidence and argument to support their respective positions in an inquiry where the applicability of s. 25(1) is at issue.”<sup>3</sup> I agree.

## DISCUSSION

### *Information in dispute*

[6] The RMOW withheld a small amount of information under s. 22(1), specifically, names, addresses, signatures, email addresses and telephone and fax numbers. The RMOW also applied s. 21(2) to one page.<sup>4</sup> The information withheld under ss. 21(2) and 22(1) is the information in dispute.

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<sup>1</sup> The public body must refuse to disclose information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

<sup>2</sup> The public body must refuse to disclose personal information where its disclosure would be an unreasonable invasion of third-party privacy.

<sup>3</sup> See, for example, Order F07-23, 2007 CanLII 52748 (BC IPC), and Order 02-38, 2002 CanLII 42472 (BC IPC).

<sup>4</sup> The RMOW annotated the withheld information on this page (p. 412) and its table of records with s. 22(2). However, its initial submission stated that it was only applying s. 21(2) to this page.

[7] The RMOW annotated a small amount of information with s. 21(1)(a)(ii)<sup>5</sup> but did not provide a submission on this exception. Section 21(1)(a)(ii) addresses harm to third-party business interests from disclosing commercial, financial, labour relations, scientific or technical information of or about a third party. However, the applicant stated that she does not seek financial information and has “no issue with such being redacted.”<sup>6</sup> I could also find no mention of this issue in her submission. I conclude, therefore, that I need not consider this information.

**Section 25(1) – public interest override**

[8] The applicant argued that both ss. 25(1)(a) and (b) require the disclosure of the information at issue. The RMOW disagrees.

[9] Section 25(1) reads as follows:

25 (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

- (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
- (b) the disclosure of which is, for any other reason, clearly in the public interest.

[10] Section 25(1) overrides all of FIPPA’s discretionary and mandatory exceptions to disclosure.<sup>7</sup> Consequently, there is a high threshold before it can properly come into play.<sup>8</sup> Previous orders have said that “... the duty under section 25 only exists in the clearest and most serious of situations.”<sup>9</sup>

*Section 25(1)(a)*

[11] In Investigation Report F15-02,<sup>10</sup> former Commissioner Denham referred to examples of information about a risk identified in s. 25(1)(a), such as:

- information that discloses the existence of the risk;

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<sup>5</sup> Page 372. Section 21(1) requires a public body to withhold financial or other information of a third party, under certain conditions.

<sup>6</sup> Request for review of December 28, 2017, page 2, para. 4(b).

<sup>7</sup> Section 25(2).

<sup>8</sup> See Investigation Report F15-02, 2015 BCIPC 30 (CanLII), pp. 28-29.

<sup>9</sup> Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 46.

<sup>10</sup> See Investigation Report F15-02, 2015 BCIPC 30 (CanLII), at p. 12, with reference to Order 02-38, 2002 CanLII 42472 (BC IPC).

- information that describes the nature of the risk and the nature and extent of any harm that is anticipated if the risk comes to fruition and harm is caused; and
- information that allows the public to take action necessary to meet the risk or mitigate or avoid harm.

[12] The applicant said she believes that the “redacted information” relates to events that happened at her Whistler property, specifically, “attempts to flood, damage and/or burn down” people’s property, “attempts to deprive them of legitimate ownership of property and attempts to financially ruin or restrict them by imposition of inappropriate taxes and costs.” She said these things are about a risk of significant harm. She also described certain issues and deficiencies in her unit which she believes constitute a fire hazard.<sup>11</sup>

[13] The RMOW acknowledged the importance of fire prevention but said that the personal and tax information at issue, collected more than 10 years ago, does not satisfy the criteria in s. 25(1)(a).<sup>12</sup>

[14] I acknowledge that the applicant has concerns about her safety and that of her unit. However, the withheld information does not reveal, and is not related to, any such safety issues. It does not disclose or describe any risk of harm to the environment or to anyone’s health or safety. It is also not information that would allow the public to take action against any such risks. I find that s. 25(1)(a) does not apply to the information in dispute.

#### *Section 25(1)(b)*

[15] Former Commissioner Denham said that, in order for s. 25(1)(b) to apply, disclosure of the information under consideration must be, not just arguably in the public interest, but clearly (i.e., unmistakably) in the public interest. She expressed the view that “‘clearly’ means something more than a ‘possibility’ or ‘likelihood’ that disclosure is in the public interest.”<sup>13</sup> She added that s. 25(1)(b) “requires disclosure where a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest.”<sup>14</sup> Former Commissioner Denham provided a non-exhaustive list of factors public bodies should consider in determining whether s. 25(1)(b) applies to information.<sup>15</sup> These factors include whether the information would: contribute to educating the public about the matter; contribute in a substantive way to the body

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<sup>11</sup> Applicant’s response submission, Parts A, B and C.

<sup>12</sup> RMOW’s initial submission, p. 2; RMOW’s reply submission.

<sup>13</sup> Investigation Report F15-02, 2015 BCIPC 30 (CanLII), at p. 28.

<sup>14</sup> Investigation Report F15-02, 2015 BCIPC 30 (CanLII), at p. 29.

<sup>15</sup> Investigation Report F16-02, 2016 BCIPC 36 (CanLII), p. 6.

of information already available about the matter; or contribute in a meaningful way to holding the public body accountable for its actions or decisions.<sup>16</sup>

[16] The RMOW disagreed that the information in dispute meets the criteria in s. 25(1)(b).<sup>17</sup> The applicant referred to “a pending public inquiry into money laundering in real estate in British Columbia. This must include fraudulent dealings.” She continued:

As this is Canada, and not a third world dictatorship, it would be very surprising to many people how flagrant this egregious behaviour and disrespect is that exist in real estate at Whistler. RMOW needs to “step up” here with respect to what is happening at Whistler.”

[17] I understand the applicant to suggest that disclosure of the information in dispute would contribute to the public’s understanding of money laundering issues related to BC real estate and that its disclosure is thus required in the public interest under s. 25(1)(b).<sup>18</sup>

[18] Once again, I recognize that the applicant has fire safety and other concerns about her unit. However, the RMOW disclosed almost all of the requested records. Disclosure of the small amount of information in dispute would not, in my view, add in any substantive way to information already available on issues related to money laundering and BC real estate, as the applicant seems to suggest. Nor would it contribute to educating the public on this matter. I do not consider that this is a case in which the public interest outweighs and overrides all the exceptions to disclosure under FIPPA. It is not, in my view, clearly in the public interest under s. 25(1)(b) for the withheld information to be disclosed. For these reasons, I find that s. 25(1)(b) does not apply.

### ***Section 21(2) – gathered for determining tax liability or collecting a tax***

[19] Section 21(2) states that the head of a public body must refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.<sup>19</sup>

[20] In Order F05-29, former Commissioner Loukidelis explained the purpose of s. 21(2) as follows:

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<sup>16</sup> Investigation Report F16-02, 2016 BCIPC 36 (CanLII), pp. 26-27.

<sup>17</sup> The RMOW’s initial submission, p. 2; RMOW’s reply submission.

<sup>18</sup> Applicant’s response submission, Parts A, B and C.

<sup>19</sup> Section 21(3) says that s. 21(2) does not apply if the third party consents to the disclosure. There is nothing to suggest that the RMOW informed the third parties of the applicant’s request or that they consented to disclosure.

In my view, the purpose of s. 21(2) is to protect information that a public body obtains from a taxpayer (on the taxpayer's tax return) or otherwise gathers relating to the taxpayer for the purpose of determining tax liability or collecting a tax. The policy of this disclosure exception is to protect information obtained or gathered relating to the taxpayer for the purpose of determining tax liability or collecting a tax, without, unlike s. 21(1), requiring the establishment of confidentiality of the information or a reasonable expectation of harm to the taxpayer from its disclosure.<sup>20</sup>

[21] The RMOW said that the information it withheld under s. 21(2) was "collected for the purposes of determining a tax liability or collecting a tax." It said that it believes s. 21(2) "was appropriately applied."<sup>21</sup> The RMOW did not, however, explain why it thinks this.

[22] The applicant suggested that the information at issue is "likely about 'business interests' and an unrevealed tax" related to the individual who, she said, applied for permits for a unit in the applicant's building. The applicant further argued that the "vital importance of fire prevention is deeply intertwined with who has 'positioned' tax/or lack of it and what is being taxed."<sup>22</sup> She added the "tax document" at issue "is most likely related to equitable title" related to the strata plan for her development.<sup>23</sup>

[23] I cannot say much about the record at issue without revealing withheld information. I can say, however, that it relates to taxes. There is no suggestion or evidence that the information at issue was "obtained on a tax return." The question is, therefore, whether the information was "gathered for the purpose of determining tax liability or collecting a tax."

[24] Order F05-29 found that s. 21(2) "does not cover information that is generated, or created, by a public body by applying skills, techniques and professional judgement to information that it has gathered (even where underlying information that is analyzed to create the disputed information has been gathered directly from a taxpayer)."<sup>24</sup> That order also found that, for the purposes of s. 21(2), "gathered" includes "information relating to the taxpayer that is gathered by the public body without the taxpayer's positive or consensual involvement, or even knowledge."<sup>25</sup>

[25] There is no evidence that a public body generated or created the information at issue. Rather, in my view, it is evident from the face of the record that a public body "gathered" the information at issue from several entities for the

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<sup>20</sup> Order F05-29, 2005 CanLII 32548 (BC IPC), at para. 92.

<sup>21</sup> The RMOW's initial submission, p. 1.

<sup>22</sup> Applicant's response submission, Part C, p. 2.

<sup>23</sup> Applicant's response submission, Part C, p. 8.

<sup>24</sup> Order F05-29, 2005 CanLII 32548 (BC IPC), at para. 96.

<sup>25</sup> Order F05-29, 2005 CanLII 32548 (BC IPC), at para. 95.

purpose of collecting taxes from a third party. I find, therefore, that s. 21(2) applies to the information at issue on page 412.

**Section 22(1) – unreasonable invasion of third-party personal privacy**

[26] The approach to applying s. 22(1) of FIPPA has long been established. See, for example, Order F15-03, where the adjudicator said this:

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.<sup>26</sup>

[27] I have taken the same approach in considering the s. 22 issues here.

*Is the information “personal information”?*

[28] FIPPA defines “personal information” as recorded information about an identifiable individual, other than contact information. “Contact information” is defined in Schedule 1 of FIPPA 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.”

[29] The RMOW said that the information in dispute is personal information and is not contact information.<sup>27</sup> The applicant did not explicitly address this issue.

[30] The withheld information consists of names, addresses, signatures, email addresses, telephone and fax numbers of various named individuals. This information is recorded information about identifiable individuals. It is not “contact information.” I find that it is “personal information.”

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<sup>26</sup> Order F15-03, 2015 BCIPC 3 (CanLII), at para. 58.

<sup>27</sup> RMOW’s initial submission, p. 2.

*Does s. 22(4) apply?*

[31] The RMOW argued that this provision does not apply here.<sup>28</sup> The applicant did not address this point.

[32] I agree with the RMOW that there is no basis for finding that s. 22(4) applies here. The personal information at issue does not, for example, relate to any third party's position, functions or remuneration as an officer, employee or member of a public body (s. 22(4)(e)).

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

[33] The RMOW argued that s. 22(3) does not apply.<sup>29</sup> The applicant did not address this issue.

[34] The information in dispute does not fall within any of the categories of information listed in s. 22(3). I find that s. 22(3) does not apply to the information in dispute.

*Relevant Circumstances*

[35] I found that the withheld personal information at issue does not fall under s. 22(3). However, it is still necessary to consider the relevant circumstances in determining whether disclosure of the withheld information would be an unreasonable invasion of third-party privacy.<sup>30</sup>

[36] The RMOW said that “[n]one of the considerations listed in Section 22(2) preclude the position that releasing the information would be an unreasonable invasion of third party privacy.”<sup>31</sup> The RMOW did not elaborate on this statement. The applicant did not explicitly address s. 22(2).

[37] Nothing in the material before me suggests that the circumstances listed in s. 22(2) are relevant in this case. I considered the applicant's argument that it is “important to be able to elucidate who has participated in this unconscionable behaviour and has vested interests, and who is innocent.”<sup>32</sup> (I take the term “unconscionable behaviour” to refer to the actions of those the applicant believes are responsible for the issues she has had with her unit.) However, I do not see why it is important to know these things and the applicant did not explain.

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<sup>28</sup> RMOW's initial submission, p. 2.

<sup>29</sup> RMOW's initial submission, p. 2.

<sup>30</sup> Past orders have said that, even if personal information does not fall under s. 22(3), this does not mean that, under s. 22(1), the information can be disclosed without unreasonably invading third-party privacy. See, for example, Order F05-08, 2005 CanLII 11959 (BC IPC), and F05-28, 2005 CanLII 30678 (BC IPC).

<sup>31</sup> RMOW's initial submission, p. 2.

<sup>32</sup> Applicant's response submission, Part C.



*Conclusion on s. 22(1)*

[38] I found above that the information in dispute is personal information and that ss. 22(3) and (4) do not apply to it. I also found that there are no relevant circumstances, including those listed under s. 22(2), which favour disclosure of the withheld information. The applicant has not explained why she should have access to other people's personal information. In short, she has not persuaded me that the information at issue should be disclosed. In my view she has not met her burden of proof and I find that s. 22(1) applies to the information at issue.<sup>33</sup>

**CONCLUSION**

[39] For reasons given above, under s. 58(2)(c) of FIPPA, I require the RMOW to refuse the applicant access to the information in dispute.

December 9, 2019

**ORIGINAL SIGNED BY**

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Celia Francis, Adjudicator

OIPC File Nos.: F18-72839  
F18-74961

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<sup>33</sup> See Order F05-28, 2005 CanLII 30678 (BC IPC), for a similar finding.