



Order F20-13

VANCOUVER COASTAL HEALTH

Lisa Siew
Adjudicator

April 22, 2020

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Summary: An applicant requested access to records in her human resources file from Vancouver Coastal Health, including records related to her work performance. Vancouver Coastal Health provided some records, but it refused to disclose some information under ss. 13 (advice and recommendations) and 22 (unreasonable invasion of third party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). Vancouver Coastal Health also argued that certain records were outside the scope of FIPPA under s. 3(1)(d) or were not responsive to the applicant's access request. The adjudicator determined that Vancouver Coastal Health was required to withhold some information under s. 22(1), but ordered it to disclose the rest of the disputed information since ss. 13 and 22(1) did not apply. The adjudicator also found that s. 3(1)(d) did not apply to certain records; however, the adjudicator determined that those records were not responsive to the applicant's access request. As a result, the adjudicator concluded Vancouver Coastal Health had performed its duty under s. 6(1) to respond to the access request openly, accurately and completely.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(d), 6(1), 13 and 22.

INTRODUCTION

[1] An applicant requested Vancouver Coastal Health (Coastal Health) provide access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to all records in her human resources file. She also requested access to records about her work performance in the files of her former supervisor.¹ Coastal Health provided the applicant with only some of the information from the requested records.² The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review Coastal Health's decision.

¹ Applicant's access request dated March 29, 2018 and Coastal Health's response submission at para. 5.

² Coastal Health refers to the records in its initial response as the "May 2018 Records."

[2] As a result of mediation, Coastal Health revised its initial response and released additional information to the applicant.³ However, Coastal Health continued to withhold some information under ss. 13 (advice and recommendations) and 22 (unreasonable invasion of third party personal privacy) of FIPPA.

[3] During mediation, Coastal Health also reconsidered its earlier decision that certain completed job interview assessment forms about the applicant are responsive to the access request. Coastal Health refers to these records as the “LPN Records” and said that it was now refusing access to them because they do not relate to the applicant’s request. Mediation did not resolve these issues and the applicant requested the matter proceed to inquiry.

[4] Under s. 54(b) of FIPPA, the applicant’s former supervisor was invited to make a submission on the information withheld under s. 22; however, the supervisor declined to do so.

[5] Coastal Health and the applicant provided submissions in this inquiry. In its submission, Coastal Health clarified that a telephone number withheld from a record is the applicant’s telephone number.⁴ The applicant says she is not interested in her own telephone number and Coastal Health may withhold this information.⁵ Therefore, I will not consider this information as part of this inquiry since it is no longer in dispute.

PRELIMINARY MATTER

[6] In its response submission, Coastal Health claimed for the first time that s. 3(1)(d) applied to the same records that it says are not responsive to the applicant’s access request (i.e. the LPN Records).⁶ Section 3(1)(d) was not identified as an issue in the OIPC investigator’s fact report or in the notice of inquiry. Previous OIPC orders have consistently said that parties may only add new issues into the inquiry if permitted to do so by the OIPC.⁷

[7] Coastal Health introduced this new issue very late in the inquiry process without the OIPC’s prior approval and without allowing the applicant an opportunity to respond. I will, however, consider this issue as it goes directly to whether FIPPA even applies and because I find there is no prejudice to the applicant in these circumstances. I considered whether the applicant should have

³ Coastal Health refers to the records in its revised response as the “January 2019 Records.” Pages 1-70 of the January 2019 Records are duplicates of records found at pp. 61-130 of the May 2018 Records.

⁴ Page 4 of the January 2019 Records (duplicated on p. 74 of the May 2018 records).

⁵ Applicant’s submission at para. 12.

⁶ Coastal Health’s response submission at para. 12. LPN Records located on pages 49-70 of the January 2019 Records (duplicated on pp. 109-130 of the May 2018 Records).

⁷ See for example, Order F19-41, 2019 BCIPC 46 at para. 5.

an opportunity to provide a submission on this issue; however, given my ultimate conclusion, I decided that I did not need to hear from the applicant on this matter.

[8] Section 3(1)(d) provides that FIPPA applies to all records in the custody or under the control of a public body other than “a record of a question that it is to be used on an examination or test.” Section 3(1)(d) includes records that would allow one to accurately infer such a question or that would diminish the value of the question for future use.⁸ Furthermore, a public body bears the burden of establishing that the records are excluded from the scope of FIPPA under s. 3(1).⁹

[9] Coastal Health argues that s. 3(1)(d) applies to the “LPN Records” because they “contain questions used in job interviews for LPN applicants.”¹⁰ Interview forms that contain questions and acceptable answers for a job competition may qualify as a record excluded from the scope of FIPPA under s. 3(1)(d). This provision protects the integrity and fairness of the testing process by preventing disclosure of information that would reveal the questions in advance to candidates.¹¹ However, there must be evidence that the interview questions are currently being used or that the public body intends to use them again in the future. The phrase “is to be used” in s. 3(1)(d) incorporates language in the future tense thereby limiting the scope of this provision.¹²

[10] I can see that the LPN Records contain information related to a successful interview of the applicant for a licensed practical nurse position. Coastal Health withheld the entirety of these pages that reveals the interview questions, the ideal answers and the interview panel’s handwritten notes and scores regarding the applicant’s answers to the interview questions. I can also see from reviewing the LPN Records that the interview took place a few years ago.

[11] Based on the materials before me, I am not satisfied that s. 3(1)(d) applies to the LPN Records. While I find the interview forms are a record of a question, there is no evidence that the interview questions are currently in use or will be used in the future. Coastal Health also does not explain how the interview panel’s handwritten notes and scores about the applicant would allow someone to accurately infer the interview questions. I, therefore, conclude Coastal Health has not established that the LPN Records are a record of a question that “is to be used” on an examination or test under s. 3(1)(d). As a result, I find the LPN Records are subject to FIPPA and will consider below whether these records are responsive to the applicant’s access request.

⁸ *University of British Columbia v. Lister*, 2018 BCCA 139 at para. 40.

⁹ Order F13-23, 2013 BCIPC 30 (CanLII) at para. 10. Order F17-13, 2017 BCIPC 14 (CanLII) at para. 5.

¹⁰ Coastal Health’s response submission at para. 12.

¹¹ Order F17-13, 2017 BCIPC 14 (CanLII) at para. 13.

¹² Order F17-13, 2017 BCIPC 14 (CanLII) at paras. 13-16.

ISSUES

[12] The issues I must decide in this inquiry are as follows:

1. Has Coastal Health performed its duty under s. 6(1) to respond to the applicant's access request openly, accurately and completely by not including certain records as part of its response?
2. Is Coastal Health authorized to withhold information under s. 13(1)?
3. Is Coastal Health required to withhold information under s. 22(1)?

[13] Section 57 of FIPPA, which sets out the burden of proof in an inquiry, is silent regarding who bears the burden under s. 6(1). However, previous OIPC orders have found that a public body bears the burden of establishing that it has complied with its duties under s. 6(1).¹³

[14] Under s. 57(1), the burden is on Coastal Health to prove the applicant has no right of access to all or part of the records in dispute under s. 13.

[15] Where access to personal information about a third party has been refused under s. 22, section 57(2) places the burden on the applicant to prove that disclosure of the information would not be an unreasonable invasion of a third party's personal privacy. However, a public body has the initial burden of proving that the information at issue is personal information under s. 22.¹⁴

[16] The applicant's submission includes allegations and arguments regarding other matters not set out in the OIPC investigator's fact report or the notice of inquiry. I will not address or discuss those matters as part of this inquiry. To be clear, the issues that I will decide in this inquiry are limited to those identified above.

DISCUSSION

Background

[17] The applicant was formerly employed by Coastal Health as a nurse.¹⁵ She was investigated for an alleged workplace incident. After the investigation, Coastal Health issued the applicant a "letter of warning."¹⁶ The applicant denies any wrongdoing and also alleges her former supervisor falsely claimed to have

¹³ As one example, Order 02-38, 2002 CanLII 42472 at para. 14.

¹⁴ Order 03-41, 2003 CanLII 49220 at paras. 9–11.

¹⁵ Applicant's submission at paras. 13 and 23.

¹⁶ Applicant's submission at para. 23 and pp. 5-6 of the May 2018 records.

initiated “numerous performance meetings” with her.¹⁷ The applicant says she made her access requests to prove there were no such performance meetings and to address “false and misleading statements” made against her by Coastal Health employees.¹⁸

Records at issue

[18] The records at issue are all about human resource matters related to the applicant and total approximately 60 pages. Coastal Health withheld some pages in their entirety and disclosed some pages with information redacted. The records include the following:

- Emails between Coastal Health employees (some of which are categorized by Coastal Health as witness statements);
- A third party’s handwritten notes about a number of matters;
- Medical charts and forms;
- A document containing a series of questions and topics for discussion for a meeting between the applicant and other Coastal Health employees about a workplace incident (Meeting Outline); and
- Completed interview assessment forms about the applicant for a particular position (the LPN Records).

Has Coastal Health performed its duty under s. 6(1)?

[19] Contrary to its original response, Coastal Health is now withholding the LPN Records on the basis these records are not responsive to the applicant’s access request. Where there is a dispute over the responsiveness of a record, the issue is, at its core, about the public body’s duty under s. 6(1) of FIPPA to make every reasonable effort to respond without delay to each applicant openly, accurately and completely. This section imposes a duty on a public body to identify and provide records that are responsive to the substance of an access request, subject to any exceptions to disclosure under FIPPA. Therefore, by not including certain records as part of its response, has Coastal Health performed its duty under s. 6(1) to respond to the applicant’s access request openly, accurately and completely?

[20] The applicant requested Coastal Health provide access to her “complete HR file” and her “complete file that is under [her former supervisor’s] control

¹⁷ Applicant’s submission at para. 2.

¹⁸ Applicant’s submission at paras. 2 and 15.

where [the supervisor] alleges that we had many discussions regarding my performance.”¹⁹

[21] Coastal Health says the LPN Records do not relate to the “performance management” of the applicant and they do not form part of the applicant’s human resources file because “they were generated in anticipation of employment.”²⁰ Coastal Health explains that “an employee’s personal HR file begins at the time their employment begins, and as such documents generated in anticipation of employment are not considered by our organization to form part of the employee’s HR record.”²¹ Coastal Health says the LPN Records were erroneously included in the responsive records because they are about the applicant.²²

[22] The applicant questions why the LPN Records are in Coastal Health’s possession if they are not part of her human resources file.²³ She submits that Coastal Health’s reasons for withholding them are not sufficient. Based on the applicant’s submission, I understand the applicant to mean that she wants access to the LPN Records.

[23] I have carefully considered whether the LPN Records are responsive records and conclude they are not. I agree with Coastal Health that the LPN Records are not about the applicant’s work performance since they are about her performance at a job interview. Based on Coastal Health’s explanation, I also conclude the LPN Records are not responsive to the applicant’s access request since these records do not form part of the applicant’s human resources file.

[24] I note that the applicant is seeking records that she believes may be in her human resources file to uncover information about alleged workplace incidents or disputes. Although access applicants do not have an obligation to explain the reasons and context for their request, this information may assist public bodies with identifying records that are not responsive to the request.²⁴ Based on my review of the LPN Records, none of the information in these records deals with any workplace incidents. The LPN Records predate those alleged disputes.

[25] Ultimately, for the reasons given, I conclude that Coastal Health is not required to provide the LPN Records in order to perform its duty under s. 6(1) to respond openly, accurately and completely to the applicant’s access request.

¹⁹ Access request dated March 29, 2018.

²⁰ Coastal Health’s initial submission at paras. 24-25.

²¹ Coastal Health’s initial submission at para. 25.

²² *Ibid* at para. 26.

²³ Applicant’s submission at paras. 24-25.

²⁴ Order F15-23, 2015 BCIPC 25 (CanLII) at paras. 71-72.

Section 13 – advice or recommendations

[26] Section 13(1) authorizes the head of a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. Previous OIPC orders recognize that s. 13(1) protects “a public body’s internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations.”²⁵

[27] To determine whether s. 13(1) applies, I must first decide if disclosure of the withheld information would reveal advice or recommendations developed by or for a public body or minister. Numerous orders and court decisions have considered the interpretation and meaning of “advice” and “recommendations” under s. 13(1) and similar exceptions in the freedom of information legislation of other Canadian jurisdictions.²⁶

[28] I adopt the principles identified in those cases for the purposes of this inquiry and have considered them in determining whether s. 13(1) applies to the information at issue. I note, in particular, the following principles from some of those decisions:

- A public body is authorized to refuse access to information under s. 13(1), not only when the information itself directly reveals advice or recommendations, but also when disclosure of the information would enable an individual to draw accurate inferences about any advice or recommendations.²⁷
- Recommendations include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised and can be express or inferred.²⁸
- “Advice” has a broader meaning than the term “recommendations.”²⁹ Advice also includes an opinion that involves exercising judgement and skill to weigh the significance of matters of fact, including expert opinion on matters of fact on which a public body must make a decision for future action.³⁰

²⁵ Order 01-15, 2001 CanLII 21569 at para. 22.

²⁶ See, for example: *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; Order 02-38, 2002 CanLII 42472; Order F17-19, 2017 BCIPC 20 (CanLII); Review Report 18-02, 2018 NSOIPC 2 at para. 14.

²⁷ Order 02-38, 2002 CanLII 42472 at para. 135. See also Order F17-19, 2017 BCIPC 20 (CanLII) at para. 19.

²⁸ *John Doe v Ontario (Finance)*, 2014 SCC 36 at paras. 23-24.

²⁹ *John Doe v Ontario (Finance)*, 2014 SCC 36 at para. 24.

³⁰ *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 113.

- Section 13(1) extends to factual or background information that is a necessary and integrated part of the advice.³¹ This includes factual information compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body.³²

[29] If I find s. 13(1) applies, I will then consider if any of the categories listed in ss. 13(2) or (3) apply. Sections 13(2) and (3) identify certain types of records and information that may not be withheld under s. 13(1), such as factual material under s. 13(2)(a) and information in a record that has been in existence for 10 or more years under s. 13(3).

The parties' position on s. 13

[30] Coastal Health is relying on s. 13(1) to refuse access to the Meeting Outline. It says this record is “a draft of questions to be asked during a performance management meeting.”³³ Coastal Health submits that this document contains a mixture of advice and recommendations by its human resources staff to the applicant’s former supervisor regarding a performance investigation into the applicant. It also says that the withheld information could allow the applicant to make accurate inferences about the advice and recommendations provided by its human resources staff to the former supervisor. Lastly, Coastal Health submits that this document does not fall within the type of listed documents that a public body must not refuse to disclose under s. 13(2) and that s. 13(3) does not apply since the document has been in existence for less than 10 years.

[31] The applicant does not appear to dispute Coastal Health’s claim that this document contains advice and recommendations from human resources staff. Instead, the applicant claims that the human resources advice withheld by Coastal Health should be disclosed because ss. 13(2)(a), (m) and (n) apply. Coastal Health disputes the applicant’s claim that s. 13(2) applies to the information at issue.

Analysis and findings on s. 13

[32] I am not satisfied the information withheld in the Meeting Outline consists of advice and recommendations under s. 13(1). The purpose of s. 13 is to protect a public body’s deliberative and policy-making process. I find the withheld information does not reveal a deliberative process, let alone any type of advice or

³¹ *Insurance Corporation of British Columbia v Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52-53.

³² *Provincial Health Services Authority v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94.

³³ Coastal Health’s initial submission at para. 10. Record located at pp. 87-89 of the May 2018 Records (duplicated on pp. 18-20 of the January 2019 Records).

expert opinion about human resource matters. Instead, I can see that the withheld information consists of factual statements and explanations that Coastal Health communicated to the applicant at a meeting, as well as a list of questions she was asked about a specific workplace incident.³⁴ The list of questions contains no suggestions, answers or comments.

[33] There are also three handwritten notations, but it is unclear who wrote them and Coastal Health does not provide an explanation. The notations consist of an additional question asked of the applicant and includes a factual comment about a discussion topic. Ultimately, based on its content and context, I find the purpose of this document was to investigate and gather information and it does not contain any apparent advice or recommendations. I, therefore, conclude Coastal Health cannot withhold the information in dispute under s. 13(1). Given my finding on s. 13(1), I do not need to consider ss. 13(2). I also find s. 13(3) does not apply since the document at issue has been in existence for less than 10 years.

Section 22 – unreasonable invasion of third party personal privacy

[34] Section 22 of FIPPA provides that a public body must refuse to disclose personal information the disclosure of which would unreasonably invade a third party's personal privacy. Previous OIPC orders have considered the application of s. 22 and I will apply the same approach in this inquiry.³⁵

[35] Coastal Health withheld information from the following records under section 22:

- Two emails from a third party that describes their interactions with an individual involved in an incident with the applicant. The emails include the writer's own personal opinion about the incident and the applicant.³⁶
- Two emails consisting of complaints about the applicant's behaviour. The emails describe what the applicant said and did and also include some opinion about the applicant and her actions.³⁷
- An email containing a third party's evaluation of the applicant's work performance.³⁸

³⁴ I draw the conclusion that a meeting actually took place from the "letter of warning" issued to the applicant that is located at pp. 5-6 of the May 2018 Records.

³⁵ See for example, Order F17-39, 2017 BCIPC 43 (CanLII) at paras. 71-138.

³⁶ Pages 40 and 41 (duplicated on p. 44) of the January 2019 Records.

³⁷ Pages 42 and 43 of the January 2019 Records.

³⁸ Pages 46-48 of the January 2019 Records.

- A third party's handwritten notes about another third party's medical condition or treatment.³⁹
- A third party's handwritten notes from interviews with a number of individuals, describing what the applicant and other third parties said or did during a particular incident. The notes include some of the writer's own personal commentary.⁴⁰
- Medical charts and forms containing information about Coastal Health employees and patients.⁴¹
- A form titled "provincial safety event review form" regarding an incident between a Coastal Health employee and the applicant.⁴²

Personal information

[36] The first step in any s. 22 analysis is to determine if the information is personal information. "Personal information" is defined as "recorded information about an identifiable individual other than contact information."⁴³ Information is about an identifiable individual when it is reasonably capable of identifying a particular individual, either alone or when combined with other available sources of information.⁴⁴ 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."⁴⁵

[37] Coastal Health submits that the records contain personal information about its patients and other employees. It says the patient information consists of names, treatment details, ID numbers and medical charts. Coastal Health says this information was considered responsive to the applicant's access request as it was referenced during the performance management process.

[38] Coastal Health also says some of the information consists of witness statements from a "performance management investigation" into the applicant.⁴⁶ Even though Coastal Health withheld the identity of any third parties in these records, it claims this information is sufficiently detailed that the applicant could accurately infer the identity of the third parties who supplied an opinion about the applicant. It submits, therefore, that these opinions and comments are the third

³⁹ Page 3 of the May 2018 Records.

⁴⁰ Page 28 of the May 2018 Records and pp. 39, 44 and 45 of the January 2019 Records.

⁴¹ Pages 9 and 21-38 of the January 2019 Records.

⁴² Page 12 of the January 2019 Records.

⁴³ See Schedule 1 of FIPPA for this definition.

⁴⁴ Order F16-36, 2016 BCIPC 40 (CanLII) at para. 17.

⁴⁵ See Schedule 1 of FIPPA for this definition.

⁴⁶ Coastal Health's initial submission at para. 20.

parties' personal information. Coastal Health acknowledges that the witness statements contain information that is factual information or contact information, but it says "the withholding of this information was necessary in order to prevent the Applicant from accurately inferring the identity of the third parties."⁴⁷

[39] The applicant does not appear to dispute that the withheld information is personal information. Instead, she argues that this information should be released so she can address false and misleading statements made by Coastal Health employees against her.⁴⁸

[40] I find the information withheld by Coastal Health under s. 22 qualifies as personal information. Some individuals are identified by name or there is information that is directly linked to a person, on its own or combined with other information, such as initials, signatures, ID numbers, medical records or descriptive information about a number of identifiable individuals and their actions.⁴⁹

[41] I can also see there is some information that contains a third party's opinion or comment about the applicant and her actions.⁵⁰ An individual's opinion and comments are their personal information, but only if their identity is known or can be accurately inferred.⁵¹ In this case, the third parties' identities have been withheld. However, I conclude the applicant could identify several third parties based on their opinions and comments alone since there is fact specific or incident-related information that the applicant could use to determine who provided the opinion.⁵² I conclude, therefore, that this information is both the applicant's personal information since it is about her and the personal information of the third parties since it is their opinion or comments about the applicant and her actions.

[42] There are also several instances where Coastal Health has withheld some employees' names and/or work email addresses in the sender and recipient fields and the signature block of some emails.⁵³ This type of information is generally considered contact information; however, whether information will be considered "contact information" will depend on the context.⁵⁴ In the context of this case, I find this information is not contact information because disclosing such details would reveal which employees were providing statements, or

⁴⁷ Coastal Health's initial submission at para. 21.

⁴⁸ Applicant's submission at para. 15.

⁴⁹ Information found on pp. 3 and 28 of the May 2018 Records and on pp. 9, 12, 21-38, 39-48 of the January 2019 Records.

⁵⁰ Pages 39-48 of the January 2019 Records.

⁵¹ Order F17-01, 2017 BCIPC 1 (CanLII) at para. 48. Order F14-47, 2014 BCIPC 51 at para. 14. Order F19-15, 2019 BCIPC 17 (CanLII) at para. 41.

⁵² Information found on pp. 39-48 of the January 2019 Records.

⁵³ Pages 39-48 of the January 2019 Records.

⁵⁴ Order F08-03, 2008 CanLII 13321 at para. 82; Order F14-45, 2014 BCIPC 48 at para. 41.

communicating with each other, about workplace disputes involving the applicant.⁵⁵

Section 22(4) – disclosure not an unreasonable invasion

[43] The second step in the s. 22 analysis is to determine if the personal information falls into any of the types of information or circumstances listed in s. 22(4). If it does, then the disclosure of the personal information is not an unreasonable invasion of a third party's personal privacy and the information should be disclosed.

[44] Section 22(4)(e) is relevant in this inquiry and it states that disclosure of personal information about a public body employee's position, functions or remuneration is not an unreasonable invasion of that third party's personal privacy. This provision applies to third-party identifying information that in some way relates to a third party's job duties in the normal course of work-related activities.⁵⁶

[45] Coastal Health submits that s. 22(4) does not apply to any of the personal information. Whereas, the applicant claims that s. 22(4)(e) applies although she does not elaborate on this point. In response to the applicant's assertion that s. 22(4)(e) applies, Coastal Health says the information at issue is not solely the applicant's personal information nor does it relate to the position, function or remuneration of the parties whose information the applicant is requesting.

[46] I find that s. 22(4)(e) applies to most of the information withheld on a medical form that consists of the names, signatures and initials of several Coastal Health employees.⁵⁷ I can see from the record itself that this information was used for employee identification purposes as part of the required charting process in providing care to patients. Therefore, I conclude this third-party identifying information is being provided and used by these individuals in the normal course of work-related activities and relates to the discharge of their regular job duties.

[47] I find s. 22(4)(e) also applies to some information in an email containing a third party's evaluation of the applicant's work performance.⁵⁸ Some of the withheld information in this email is a third party's factual account about what some Coastal Health employees did or said during their work shift in the normal course of performing their job duties. I, therefore, conclude that s. 22(4)(e) applies to this information, including the names of these employees. Previous OIPC orders have held that a public body employee's name and actions that

⁵⁵ Information located on pp. 40-44, 46, 48 of the January 2019 Records.

⁵⁶ Order 01-53, 2001 CanLII 21607 at para. 40.

⁵⁷ Information located on p. 36 of the January 2019 Records.

⁵⁸ Information located on pp. 46-48 of the January 2019 Records.

appear in the context of work-related activities and relates to their functions as a public body employee fall under s. 22(4)(e).⁵⁹

[48] However, I do not find that s. 22(4)(e) applies to the rest of the information in dispute since it is not about a third party's position, functions or remuneration and it is not objective, factual statements about what the third party did or said in the normal course of discharging his or her job duties.⁶⁰ Rather, some of the information is a third party's opinion or account of the applicant and her actions arising from a workplace investigation or a workplace conflict. Section 22(4)(e) does not apply to such information.⁶¹

Section 22(3) – presumptions in favour of withholding

[49] The third step in the s. 22 analysis is to determine whether any of the presumptions in s. 22(3) apply. Section 22(3) creates a rebuttable presumption that the disclosure of personal information of certain kinds or in certain circumstances would be an unreasonable invasion of third party personal privacy.⁶²

[50] Coastal Health submits that disclosing the information at issue is presumed to be an unreasonable invasion of third party privacy because some of it relates to a third party's medical diagnosis, treatment or evaluation under s. 22(3)(a), a third party's occupational and employment history under s. 22(3)(d) and the contents of a personal recommendation or evaluation, a character reference or a personnel evaluation supplied by a third party in confidence under s. 22(3)(h).

Medical history, treatment and evaluation – s. 22(3)(a)

[51] Section 22(3)(a) states 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 a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation. Coastal Health withheld a patient's name and treatment details, a patient's personal health number, account number and birthdate and the medical charts of several third parties.⁶³ I can also see that there is some information in two emails and some handwritten notes that reveals specific details about a third party's medical condition or treatment.⁶⁴ I find that

⁵⁹ Order 01-15, 2001 CanLII 21569 at para. 35 and Order 04-20, 2004 CanLII 45530 at paras. 17-18.

⁶⁰ Order 01-53, 2001 CanLII 21607 at para. 40.

⁶¹ Order F08-04, 2008 CanLII 13322 at para. 24.

⁶² *B.C. Teachers' Federation, Nanaimo District Teachers' Association et al. v Information and Privacy Commissioner (B.C.) et al.*, 2006 BCSC 131 (CanLII) at para. 45.

⁶³ Information located on pp. 21-38 of the January 2019 Records.

⁶⁴ Information located on p. 3 of the May 2018 Records and pp. 39, 40, 46-48 of the January 2019 Records.

s. 22(3)(a) clearly applies to all of this information since it relates to a third party's medical history, condition, treatment or evaluation. Therefore, the disclosure of this information is presumed to be an unreasonable invasion of third party personal privacy under s. 22(3)(a).

Employment history – s. 22(3)(d)

[52] Section 22(3)(d) applies to personal information that relates to the employment history of a third party. Previous OIPC orders have found that the term “employment history” under s. 22(3)(d) includes descriptive information about a third party's workplace behavior or actions in the context of a workplace complaint investigation or disciplinary matter.⁶⁵

[53] Coastal Health withheld several emails and some handwritten notes that it refers to as “witness statements” under s. 22(3)(d).⁶⁶ Coastal Health claims these records relate to workplace incidents or complaints about the applicant and include allegations about the applicant's interactions with some witnesses.⁶⁷ Coastal Health argues that the information withheld from these records is the employment history of those witnesses and their interactions with the applicant.

[54] I find s. 22(3)(d) applies to information in several records that describes what one identifiable third party said or did in relation to a particular workplace incident involving the applicant and that third party.⁶⁸ This information occurs in the context of an investigation into the workplace behaviour of not only the applicant, but also the third party. Therefore, I conclude this information qualifies as the applicant's employment history and the third party's own employment history under s. 22(3)(d).

[55] However, I do not find that s. 22(3)(d) applies to any of the other withheld information since s. 22(3)(d) does not apply to factual information about what a third party observed, said or did regarding workplace interactions with the applicant.⁶⁹ Although it is the third parties' personal information, this information is not about an investigation into the workplace conduct of these third parties; they are not the subject of the investigation. Instead, this information reveals a third party's description, comment or opinion about the applicant and her workplace behaviour.⁷⁰ I conclude, therefore, that this information is about the applicant's employment history and not a third party's employment history as intended under s. 22(3)(d).

⁶⁵ Order 01-53, 2001 CanLII 21607 at para. 32.

⁶⁶ Information located on pp. 39-48 of the January 2019 Records.

⁶⁷ Coastal Health's initial submission at para. 20.

⁶⁸ Information located on p. 28 of the May 2018 Records and pp. 40, 41 (duplicated on p. 44), 45 of the January 2019 Records.

⁶⁹ Order F19-41, 2019 BCIPC 46 at para. 62. Order 01-53, 2001 CanLII 21607 at para. 41: names of witnesses and other personal information about them is not covered by s. 22(3)(d).

⁷⁰ Information located on pp. 39, 42, 43, 46-48 of the January 2019 Records.

[56] Coastal Health also withheld two ID numbers on a form titled “provincial safety event review form.”⁷¹ Coastal Health disclosed all the information on this form except the two ID numbers. Previous OIPC orders have found that a person’s employee number or personal identifiers for an employee may form part of their employment history under s. 22(3)(d).⁷² It is clear that one ID number belongs to the applicant’s former supervisor. Coastal Health disclosed the supervisor’s name, work email address and job title, but withheld the supervisor’s ID number.⁷³ As other OIPC orders have found, I conclude that s. 22(3)(d) applies to the supervisor’s ID number since it is an individual, personal identifier assigned to her as part of her employment.

[57] As for the other ID number, I can see that the form is related to a workplace incident between a Coastal Health employee and the applicant. However, it is unclear and Coastal Health does not explain or identify the owner of this ID number.⁷⁴ This number appears under a section of the form titled “*People affected*” and there are two question marks where the last and first name of the person should be entered. I am, therefore, unable to determine from the materials before me that this ID number belongs to a specific Coastal Health employee. Therefore, I am not satisfied that s. 22(3)(d) applies to this information.

Contents of a personal evaluation or personnel evaluation - s. 22(3)(h)

[58] Section 22(3)(h) presumes disclosure to be an unreasonable invasion of third party personal privacy where the applicant could reasonably be expected to know the identity of a third party who provided a personal recommendation or evaluation, character reference or a personnel evaluation in confidence. The purpose of s. 22(3)(h) is to protect the identity of a third party who has provided evaluative or similar material, in confidence, about an individual. It has generally been found to apply in the context of a formal workplace investigation or in human resources matters.⁷⁵

[59] In addition to s. 22(3)(d), Coastal Health also argues that s. 22(3)(h) applies to the records that it refers to as the “witness statements.”⁷⁶ It says these records were either referenced or generated during a performance management investigation into the applicant.⁷⁷ Coastal Health did not identify which specific type of s. 22(3)(h) record that it thinks applies. However, based on my review of the disputed information, I conclude the question is whether the disputed

⁷¹ Pages 9 and 12 of the January 2019 Records.

⁷² Order F14-41, 2014 BCIPC 44 (CanLII) at para. 46; Order F15-17, 2015 BCIPC 18 (CanLII) at para. 37 and Order 03-21, 2003 CanLII 49195 at paras. 25-26.

⁷³ Information located on p. 12 of the January 2019 Records.

⁷⁴ Information located on p. 9 of the January 2019 Records.

⁷⁵ Order F10-08, 2010 BCIPC 12 at para. 33.

⁷⁶ Information located on pp. 39-48 of the January 2019 Records.

⁷⁷ Coastal Health’s initial submission at para. 20.

information qualifies as a “personal evaluation” or “personnel evaluation” for the purposes of s. 22(3)(h). Having found that s. 22(3)(d) applies to some of the information in the particular records at issue, it is also not necessary for me to consider whether s. 22(3)(h) applies. Therefore, I will only consider whether s. 22(3)(h) applies to the information not yet subject to a presumption under s. 22(3).⁷⁸

[60] In order for information to be considered a personal or personnel evaluation, there must be a formal evaluation of an individual’s performance.⁷⁹ Previous OIPC orders have found s. 22(3)(h) applies to formal performance reviews and evaluative comments or views by an investigator regarding a workplace complaint investigation.⁸⁰ However, s. 22(3)(h) does not apply to an employee’s allegations about a fellow employee, employee comments or complaints about workplace attitudes and behaviour, or employee feedback and opinions about other employees on workplace issues.⁸¹

[61] I find that s. 22(3)(h) does not apply to the information at issue. As noted previously, most of the withheld information reveals a third party’s observations or allegations about the applicant and her workplace behaviour. Coastal Health does not sufficiently explain that what these third parties said about the applicant and their interactions with her were made in the context of a formal evaluation of the applicant. Instead, some of the records are emails from a third party complaining about the applicant’s workplace behaviour.⁸² Section 22(3)(h) does not apply to witness statements about an employee’s actions or behaviour in the workplace, including in the context of workplace complaint investigations or in similar situations.⁸³

[62] I note there is one record where an employee is conducting a written evaluation of the applicant akin to a formal performance review.⁸⁴ However, in terms of confidentiality, there are no explicit statements or indicators of confidentiality in the evaluation nor is there any evidence about confidentiality from the employee who conducted the evaluation. It is also not obvious from the content of the evaluation or from the nature of the evaluative process that this information was supplied by the third party employee in confidence.

⁷⁸ Information located on pp. 39, 42, 43, 44, 46-48.

⁷⁹ Order 01-07, 2001 CanLII 21561 at paras. 21-22.

⁸⁰ Order F06-11, 2006 CanLII 25571 at para. 53; Order F05-30, 2005 CanLII 32547 at paras. 41-42; Order 01-07, 2001 CanLII 21561 at para. 21.

⁸¹ Order F06-11, 2006 CanLII 25571 at paras. 52-54; Order 01-07, 2001 CanLII 21561 at paras. 21-22, Order F05-30, 2005 CanLII 32547 at paras. 41 and 42; Order F10-08, 2010 BCIPC 12 at paras. 33-35.

⁸² Information located on pp. 42 and 43.

⁸³ Order F10-08, 2010 BCIPC 12 at para. 34.

⁸⁴ Information located on pp. 46-48 of the January 2019 Records.

[63] There are also some handwritten evaluative comments by the supervisor about the applicant's workplace behaviour in a number of other records.⁸⁵ However, there is insufficient evidence that this information was "supplied" by the supervisor to another person in confidence. I, therefore, do not find that the presumption under s. 22(3)(h) applies to any of this information.

Section 22(2) – relevant circumstances

[64] The final step in the s. 22 analysis is to consider the impact of disclosing the personal information at issue in light of all relevant circumstances, including those listed under s. 22(2). It is at this stage of the analysis that the presumptions I found to apply under ss. 22(3)(a) and (d) may be rebutted.

[65] Coastal Health submits that ss. 22(2)(e) and (f) are relevant circumstances that weigh against disclosure. The applicant argues that she is entitled to the information because it is about her and she also says she would have likely seen all of the withheld information in her role as a nurse.⁸⁶

Unfairly exposing the third party to harm – s. 22(2)(e)

[66] Section 22(2)(e) requires a public body to consider whether disclosure of a third party's personal information will unfairly expose the third party to financial or other harm. Without any further explanation or evidence, Coastal Health asserts that s. 22(2)(e) is relevant because it is concerned about the potential harm that disclosure of the witness statements would have on the witnesses and employees who provided the information about the applicant.⁸⁷ The applicant objects to Coastal Health's assertions about harm and says it amounts to "slandering innuendo" against her.⁸⁸ In response, Coastal Health says potential harm is part of the test for s. 22 and that it was applied appropriately.⁸⁹

[67] Based on the materials before me, I am not persuaded that disclosing any of the personal information at issue will unfairly expose a third party to harm. Previous OIPC orders have held that "other harm" for the purposes of s. 22(2)(e) consists of "serious mental distress or anguish or harassment."⁹⁰ There is insufficient explanation or evidence for me to conclude that disclosing the withheld information will unfairly expose a third party to this kind of harm. A public body's assertions alone about harm is not sufficient to establish that s. 22(2)(e) applies. There is also nothing in the records themselves or the surrounding circumstances to suggest the third parties will be exposed unfairly to the type or

⁸⁵ Information located on pp. 39 and 44 of the January 2019 Records.

⁸⁶ Applicant's submission at paras. 17-20.

⁸⁷ Coastal Health's initial submission at para. 20.

⁸⁸ Applicant's submission at para. 20.

⁸⁹ Coastal Health's response submission at para. 11.

⁹⁰ Order F15-29, 2015 BCIPC 32 at para. 33.

level of harm s. 22(2)(e) addresses. Therefore, without more, I am not satisfied that s. 22(2)(e) is a circumstance that favours non-disclosure.

Supplied in confidence – s. 22(2)(f)

[68] Coastal Health submits that a relevant factor weighing against disclosure is that “in many cases the third party that supplied the information explicitly stated that they were doing so in confidence.”⁹¹ It also says “the need for confidentiality can otherwise be inferred due to the nature of this information.”⁹² The applicant does not explicitly address Coastal Health’s assertions about confidentiality, but says she has a right to review and correct any false and misleading statements about herself.⁹³

[69] I find that s. 22(2)(f) applies to an email where a third party is describing an incident between the applicant and another Coastal Health employee and providing some personal views and opinions.⁹⁴ I can see that the email contains a comment that indicates the email was intended to be confidential when it was provided to another Coastal Health employee. I am, therefore, satisfied that this information was supplied in confidence by the third party.

[70] I also find that s. 22(2)(f) applies to information in some emails and a third party’s handwritten notes that reveals the names, identity and comments of several third parties that made a complaint about the applicant.⁹⁵ Previous OIPC orders have typically found that complainant information is usually supplied in confidence.⁹⁶ Given the content of these emails, I find it reasonable to conclude in this case that these third parties provided some comments in confidence and expected their identities to be protected. I, therefore, find the fact that some records in this case contain information that reveals the identity and comments of a third party complainant weighs in favour of non-disclosure.

[71] As for the rest of the information in dispute, it is not obvious from the content and context of the remaining records that the withheld information was explicitly or implicitly supplied in confidence. For example, Coastal Health claims the third parties explicitly said they were providing the information in confidence; however, there are no express statements about confidentiality in the records themselves nor can it be inferred from the third parties’ comments or views. As for the formal evaluation of the applicant discussed under s. 22(3)(h), I reiterate that it is not obvious from the content of the evaluation or from the nature of the

⁹¹ Coastal Health’s initial submission at para. 20.

⁹² Coastal Health’s initial submission at para. 20.

⁹³ Applicant’s submission at paras. 15-20.

⁹⁴ Email located on p. 41 (duplicated on p. 44) of the January 2019 Records.

⁹⁵ Information located on pp. 39, 42-45 of the January 2019 Records.

⁹⁶ See for example, Order F15-29, 2015 BCIPC 32 at para. 43.

evaluative process that this information was supplied by the third party employee in confidence.⁹⁷

[72] It is also not obvious that some of the information withheld under s. 22 was “supplied” in confidence. As previously discussed under s. 22(3)(h), Coastal Health has not explained, and it is not apparent to me, that a third party’s handwritten notes were provided to another person, let alone that it was provided in confidence.⁹⁸ Therefore, without more, I am not satisfied s. 22(2)(f) is a relevant factor weighing against disclosure of the remaining information withheld under s. 22.

Applicant’s personal information

[73] A factor that supports disclosure is that some of the withheld information is the personal information of the applicant. Previous OIPC orders have stated that it would only be in rare circumstances where disclosure to an applicant of their own personal information would be an unreasonable invasion of a third party’s personal privacy.⁹⁹

Sensitivity of the third party personal information

[74] Previous OIPC orders have considered the sensitivity of the personal information at issue and where the sensitivity of the information is high (i.e. medical or other intimate information), withholding the information should be favoured.¹⁰⁰ Some of the withheld information is the medical history and treatment information of a number of individuals. This type of information is highly sensitive and this factor weighs against disclosure. I also find some of the information about the third party’s employment history to be of a sensitive nature since it reveals some intimate information about some third parties.¹⁰¹

Applicant’s prior knowledge

[75] The applicant says she would have likely seen all of the withheld information in her role as a nurse. Although she does not explicitly say so, I understand the applicant is referring to the third parties’ medical information. In response, Coastal Health says the applicant is no longer providing care to these individuals and the disclosure of this personal information would undermine the trust that patients place in their care providers and amounts to an unreasonable invasion of their privacy.¹⁰²

⁹⁷ Pages 46-48 of the January 2019 Records.

⁹⁸ Information located on pp. 39, 44, 45 of the January 2019 Records.

⁹⁹ Order F14-47, 2014 BCIPC 51 at para. 36, citing Order F10-10, 2010 BCIPC 17 at para. 37 and Order F06-11, 2006 CanLII 25571 at para. 77.

¹⁰⁰ Order F16-52, 2016 BCIPC 58 at para. 87.

¹⁰¹ Information located on pp. 41 and 44 of the January 2019 Records.

¹⁰² Coastal Health’s response submission at para. 17.

[76] Previous OIPC orders have found that it would not be an unreasonable invasion of personal privacy under s. 22 to disclose third party personal information already known to the applicant.¹⁰³ However, in this case, the information at issue is the sensitive medical information of several third parties. Therefore, I find the fact that the applicant likely already knows this third party medical information does not sufficiently outweigh the sensitive nature of this information.

Conclusion on s. 22(1)

[77] To summarize, I find the information being withheld under s. 22 qualifies as the personal information of several individuals, including the applicant. I conclude s. 22(4)(e) applies to some of this personal information since it consists of third-party identifying information that relates to the function or discharge of a Coastal Health employee's regular job duties.¹⁰⁴

[78] As for the rest of the withheld information, I find that the presumptions under ss. 22(3)(a) and (d) apply to some of the personal information since it consists of a third party's medical history, condition, treatment or evaluation¹⁰⁵ or relates to a third party's employment history.¹⁰⁶ There were no presumptions applicable to the other withheld information, specifically I find that s. 22(3)(d) does not apply to factual information about what some third parties observed regarding workplace interactions with the applicant since this information did not arise from an investigation into these third parties and how they performed their duties. I also conclude the presumption under s. 22(3)(h) does not apply since there was insufficient evidence that a third party provided a personal or personnel evaluation in confidence.

[79] Considering all the relevant circumstances, I find it would be an unreasonable invasion of a third party's personal privacy to disclose information related to a third party's medical history, condition, treatment or evaluation. I found the presumption under s. 22(3)(a) applies to this information and, in these circumstances, the applicant's knowledge about a third party's medical history does not rebut this presumption. I find the nature and sensitivity of this information, along with the fact that the applicant no longer has access to this information, outweighs the fact that the applicant likely has prior knowledge of this information.

¹⁰³ See for example, Order F19-41, 2019 BCIPC 46 at paras. 79-80.

¹⁰⁴ Information located on pp. 36 and 46-48 of the January 2019 Records.

¹⁰⁵ Information located on p. 3 of the May 2018 Records and pp. 9, 21-38, 39, 40, 46-48 of the January 2019 Records.

¹⁰⁶ Information located on p. 28 of the May 2018 Records and pp. 12, 40, 41, 44, 45 of the January 2019 Records.

[80] I also find it would be an unreasonable invasion of a third party's personal privacy to disclose information that relates to a third party's employment history under s. 22(3)(d). Although some of the information contains the personal information of both the applicant and a third party, I find the presumption under s. 22(3)(d) is not rebutted considering disclosure would reveal some sensitive information about a number of third parties. I also find it would unreasonably invade a third party's personal privacy to disclose information that would reveal the identity of some third party complainants and their comments since this information was supplied in confidence.¹⁰⁷

[81] I considered whether there were any factors in favour of disclosing the two ID numbers withheld from the applicant on the form titled "provincial safety event review form" and could find none. I found the presumption under s. 22(3)(d) applied to the supervisor's ID number and I am not satisfied this presumption is rebutted. The applicant is aware that one of the ID numbers belongs to her former supervisor, but she did not identify any relevant factors in favour of disclosure.

[82] However, I find that disclosing the balance of the information would not unreasonably invade a third party's personal privacy under s. 22. I conclude that it would not be an unreasonable invasion to disclose factual information about what a third party observed regarding a workplace interaction with the applicant.¹⁰⁸ I found there were no s. 22(3) presumptions that applied to this information and it is mostly factual, non-sensitive information about the applicant and other third parties.

[83] I also conclude that it would not be an unreasonable invasion of third party personal privacy to disclose a specific third party's workplace evaluation of the applicant.¹⁰⁹ I found that s. 22(3)(a) applies to some of the information in this workplace evaluation since it describes a third party's medical condition or treatment. However, most of the information in this record is about the applicant which weighs in favour of disclosure and any information subject to the presumption under s. 22(3)(a) is easily severable from the record. There is also no evidence that the third party supplied the evaluation in confidence and most of the evaluative comments are positive or constructive comments about the applicant. As a result, I find Coastal Health may not withhold this information under s. 22.

¹⁰⁷ Information located on pp. 39, 42-45 of the January 2019 Records.

¹⁰⁸ Information located on p. 42 of the January 2019 Records.

¹⁰⁹ Information located on pp. 46-48 of the January 2019 Records.

Section 22(5) – summary of the information provided in confidence

[84] I found there was some information about the applicant supplied in confidence by a number of third party complainants.¹¹⁰ If a summary of personal information supplied in confidence about an applicant can be prepared without revealing the identity of the third party who supplied the confidential information, s. 22(5)(a) requires the public body to give that summary to the applicant.

[85] Coastal Health says it has already met its duty under s. 22(5) to provide the applicant with a summary of any information provided in confidence about her. It says the applicant would have received this summary during her performance management meetings and during a labour relations grievance process.¹¹¹

[86] The applicant says she did not receive “any summaries of alleged performance meetings because the documents did not exist.”¹¹² The applicant asserts that no management performance meetings were conducted and any alleged meetings were “generated as retaliation.”¹¹³

[87] I am satisfied that Coastal Health has fulfilled its obligations under s. 22(5). I have reviewed the information that Coastal Health ultimately disclosed to the applicant in response to her access request. I can see that a summary of the complaints was communicated to the applicant either verbally or in writing, without identifying the third party complainant, or there is information that persuades me that the applicant was told the substance of the complaints.¹¹⁴ As a result, I find Coastal Health is not required to provide the applicant with a section 22(5) summary.

CONCLUSION

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

1. I confirm Coastal Health has performed its duty under s. 6(1) to respond to the applicant’s access request openly, accurately and completely.
2. I require Coastal Health to give the applicant access to the information that I found it is not authorized to withhold under s. 13(1). This information is located on pages 18-20 of the January 2019 Records.

¹¹⁰ Information located on pp. 39, 42-45 of the January 2019 Records.

¹¹¹ Coastal Health’s initial submission at para. 23.

¹¹² Applicant’s submission at para. 23.

¹¹³ *Ibid.*

¹¹⁴ For example, p. 27 of the May 2018 Records and p. 3 of January 2019 Records (duplicated on p. 73 of the May 2018 Records).

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3. I confirm Coastal Health's decision to refuse access to the information withheld under s. 22(1), except for the information highlighted in a copy of the records provided to Coastal Health with this order.
 4. Coastal Health must disclose to the applicant the information it is not authorized or required to withhold and it must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, along with a copy of the relevant records.

[89] Under s. 59 of FIPPA, Coastal Health is required to comply with this order no later than June 4, 2020, which is 30 days after being given a copy of this order. Taking notice of the present state of emergency in the province, I retain conduct of this matter in case the organization wishes to seek an extension of the 30-day period.

April 22, 2020

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

OIPC File No.: F18-76034