Order F20-26

MINISTRY OF FINANCE (PUBLIC SERVICE AGENCY)

Laylí Antinuk
Adjudicator

June 16, 2020

CanLII Cite: 2020 BCIPC 31
Quicklaw Cite: [2020] B.C.I.P.C.D. No. 31

Summary: In Order F20-18, the adjudicator ordered the Ministry of Finance (Public Service Agency) to produce 20 pages of records to the OIPC so that she could make a decision respecting the public body's application of s. 22 (unreasonable invasion of personal privacy) to those 20 pages. The public body complied, producing the records for the adjudicator's review. The public body also reconsidered its application of s. 22 to 18 pages of the records and decided to disclose those pages to the applicant. The adjudicator confirmed that s. 22 did not require the public body to withhold those 18 pages and found that s. 22 applied to the information withheld under that section in the remaining two pages.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(e), 22(2)(g), 22(2)(h) and 22(3)(d).

INTRODUCTION

[1] This order completes the inquiry addressed in Order F20-18 (the first order).[1] The inquiry relates to an applicant's request to the BC Public Service Agency (the PSA)[2] for records related to a workplace investigation (the investigation) that occurred in the aftermath of the well-known Ministry of Health firings. The PSA withheld all the information in the responsive records under ss. 14 (solicitor client privilege), 13 (advice and recommendations) and 22 (unreasonable invasion of personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

---

[1] 2020 BCIPC 20.
[2] The PSA is part of the Ministry of Finance. For convenience and consistency with the first order, I have continued to use the term PSA to refer to the public body in this inquiry.

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the PSA's decision. Mediation did not resolve the matter and the applicant requested an inquiry. As the adjudicator assigned to the inquiry, I wrote the first order and found that s. 14 applied to all but three of the records in dispute – two of which (the remaining records) the PSA had also withheld under s. 22. I then ordered production of the remaining records in order to assess the PSA's application of s. 22 to them.[3] The PSA produced the remaining records for my review and provided additional submissions respecting s. 22.

[3] I offered the applicant the opportunity to respond to the PSA's additional submissions. The applicant did not provide a response.

Preliminary matters

[4] The remaining records comprise a draft document and an email.[4] I discussed these two records in detail in the first order and will not repeat those details here.[5]

[5] In its additional submissions, the PSA says that it has reconsidered its application of s. 22 to the draft document and determined that its disclosure would not constitute an unreasonable invasion of third party personal privacy.[6] As a result, the PSA states that it has decided to disclose the entire draft to the applicant, subject to any contrary opinion by the adjudicator.

[6] I agree with the PSA's reconsideration of this record and confirm its decision to release this record to the applicant. Keeping the mandatory nature of s. 22 in mind, I carefully reviewed the draft to ensure that s. 22 did not apply to it. Having done so, I find that its disclosure would not constitute an unreasonable invasion of third party personal privacy in the circumstances. In coming to this conclusion, I considered the fact that the only personal information in the 18 page draft consists of the names of a few individuals and the amount of severance an identifiable individual received.[7] This information appears or is repeated in the parts of the draft that contain anticipated questions and answers for media engagement.[8] As such, I find it reasonable to infer that the personal information in the draft is all publicly available.

---

[3] Section 44(1)(b) gives the Commissioner (or his delegates) the power to order production.
[4] At pp. 278-296 and 323-324 of the records.
[5] The first order, *supra* note 1 at paras. 47-52.
[6] The information in this paragraph comes from the PSA's May 13, 2020 submission at pp. 1 and 3.
[7] At pp. 2, 14, 15 and 19 of the PDF document produced by the PSA in compliance with the first order.
[8] The personal information on p. 2 does not appear in anticipated media questions; however, this same personal information is repeated in anticipated media questions at p. 19.

[7] Given the PSA's reconsideration of the draft and its decision to release this record to the applicant, it is no longer in dispute between the parties. Additionally, having reviewed the draft, I am satisfied that s. 22 does not apply to it. Therefore, I will not discuss it further.

ISSUE

[8] In this order, I will decide whether s. 22 applies to the information withheld in the email.

DISCUSSION

Background

[9] As discussed in the first order, the Ministry of Health fired several employees in 2012 in response to certain allegations of wrong-doing.[9] In 2015, a Committee of the Legislative Assembly referred this Ministry firing matter to the Ombudsperson for investigation and reporting. The Ombudsperson's office responded by preparing a public report (the Misfire Report) on the matter. Following the release of the Misfire Report, the PSA performed the investigation at the heart of the applicant's access request. The purpose of the investigation was to determine if the Provincial government (the employer) had just cause to discipline any of the employees who played a role in the Ministry of Health firings.[10]

Information in dispute

[10] The information in dispute appears in a two page email that relates to one of the subjects of the investigation. A member of the public sent it to a PSA employee who responded and then forwarded the exchange to a few others involved in the investigation.

Unreasonable invasion of third party personal privacy – section 22

[11] As stated in the first order, s. 22 requires public bodies to refuse to disclose personal information if disclosure would constitute an unreasonable invasion of a third party's personal privacy. This section does not guard against all invasions of personal privacy; instead, it explicitly aims to prevent only those invasions of personal privacy that would be unreasonable in the circumstances of a given case.[11]

---

[9] The first order, *supra* note 1 at paras. 5-6.
[10] Applicant's Affidavit #1 at para. 6 and Exhibits B and C. For more background details, see the first order, *supra* note 1 at paras. 5-6.
[11] Order 01-37, 2001 CanLII 21591 (BC IPC) at para. 14.

Personal information

[12] The first step in any s. 22 analysis asks whether the information at issue qualifies as personal information.

[13] FIPPA defines personal information as recorded information about an identifiable individual other than contact information.[12] Previous orders have held that information is about an identifiable individual when it is reasonably capable of identifying an individual on its own or when combined with information from other available sources.[13]

[14] As noted, FIPPA excludes contact information from the definition of personal information. FIPPA defines contact information as information to enable an individual at a place of business to be contacted. Contact information includes an individual's name, position or title, business telephone number, address, email or fax number.

[15] In the email, the PSA withheld the following information under s. 22:

- names of individuals;
- the personal email address and telephone number of a named individual;
- information about the conduct of a named individual; and
- information about workplace discipline that a named individual experienced.

This is all clearly personal information and not contact information.

[16] The applicant wants access to the records because the applicant believes "they contain information about me, and my conduct."[14] Having carefully reviewed the email, I can confirm that it does not contain any information whatsoever about the applicant. Instead, it contains information about two third parties.

Not an unreasonable invasion of privacy – section 22(4)

[17] The second step in the s. 22 analysis requires a consideration of whether s. 22(4) applies to the personal information at issue. Section 22(4) lists situations in which disclosure of personal information is not an unreasonable invasion of personal privacy. The PSA submits that none of the circumstances in s. 22(4)

---

[12] Schedule 1 of FIPPA contains its definitions.
[13] For examples, see Order F16-38, 2016 BCIPC 42 at para. 112; and Order F13-04, 2013 BCIPC 4 at para. 23.
[14] The information in this paragraph comes from the applicant's response submission at paras. 28-31.

apply to the personal information withheld in the email.[15] Based on my review of the email, I agree that s. 22(4) does not apply.

Presumed unreasonable invasion of privacy – section 22(3)

[18] The third step in the s. 22 analysis requires deciding if any of the presumptions in s. 22(3) apply to the personal information at issue. Section 22(3) lists circumstances in which disclosure of personal information is presumed to constitute an unreasonable invasion of personal privacy.

[19] The PSA submits that s. 22(3)(d) applies. Section 22(3)(d) creates a presumption against releasing personal information related to a third party's employment, educational or occupational history. Based on my review of the email, I find that s. 22(3)(d) applies. Other than the personal email address and telephone number, the withheld information relates to the employment history of two third parties, meaning that its disclosure is presumed to be an unreasonable invasion of personal privacy.

[20] I have also considered the other presumptions listed in s. 22(3) and find none of them applicable here.

Relevant circumstances – section 22(2)

[21] The last step in the s. 22 analysis requires consideration of all the relevant circumstances, including those listed in s. 22(2), to determine whether disclosure of personal information constitutes an unreasonable invasion of third party personal privacy. The relevant circumstances might rebut the s. 22(3)(d) presumption discussed immediately above.

[22] The PSA submits that ss. 22(2)(e), (g) and (h) all weigh against disclosure of the information in dispute. The applicant did not make submissions about any of the relevant circumstances listed in s. 22(2). However, as I explain below, the applicant did make arguments about why any personal information at issue should be disclosed in the circumstances.

Unfair harm – section 22(2)(e)

[23] Section 22(2)(e) asks whether disclosure will unfairly expose a third party to "financial or other harm." The PSA submits that disclosure of the information withheld in the email "could reasonably be expected to unfairly expose an individual to harm."[16] I am not persuaded by this submission for the reasons that follow.

---

[15] The PSA's May 13, 2020 submission at p. 2.
[16] *Ibid* at p. 3.

[24] First, past orders have interpreted "other harm" as serious mental distress, anguish or harassment.[17] For mental harm to fit within the meaning of "other harm," it must go beyond embarrassment, upset or a negative reaction.[18] The PSA did not provide any evidence to show that disclosure of the information at issue would unfairly expose anyone to serious mental distress, anguish or harassment. Additionally, nothing in the content of the email itself or the surrounding circumstances indicates to me that disclosure of the personal information at issue will unfairly expose any third parties to the type or level of harm captured by s. 22(2)(e).[19] Given this, I am not satisfied that s. 22(2)(e) weighs against disclosure in this case.

Unfair damage to reputation – section 22(2)(h)

[25] Section 22(2)(h) relates to circumstances where disclosure may unfairly damage the reputation of a person referred to in the records. The PSA submits that disclosure of the information in dispute "could unfairly damage the reputation of any person referred to in the email."[20]

[26] The PSA did not provide evidence to establish that disclosure might damage anyone's reputation, or any specifics as to how the alleged damage to anyone's reputation would be unfair. Having reviewed the email, it is not clear to me how its disclosure would unfairly damage anyone's reputation. Accordingly, I am not satisfied that s. 22(2)(h) weighs against disclosure in this case.

Information likely inaccurate or unreliable – section 22(2)(g)

[27] The PSA also claims that s. 22(2)(g) applies.[21] This particular subsection asks whether the personal information at issue is likely to be inaccurate or unreliable.

[28] The PSA did not link its argument respecting s. 22(2)(g) to specific information and did not explain how the information might be unreliable or inaccurate. On my review, it is not obvious to me that the personal information is likely to be inaccurate or unreliable. In fact, given that the author of the email writes about a first-hand personal experience – rather than something heard 'through the grape vine' – it seems to me that its contents might be quite accurate and reliable. With this in mind, I find that s. 22(2)(g) does not weigh against disclosure.

---

[17] Order 01-37, 2001 CanLII 21591 (BC IPC) at para. 42.
[18] Order 01-15, 2001 CanLII 21569 (BC IPC) at paras. 49-50.
[19] For similar reasoning, see Order F20-13, 2020 BCIPC 15 at para. 67.
[20] The PSA's May 13, 2020 submission at p. 3.
[21] *Ibid.*

Public knowledge

[29] The applicant says that the Misfire report publicly names the individual subjects of the investigation and notes that provincial and national media reports also named those individuals publicly.[22] From this, I take the applicant to argue that the media coverage and public knowledge surrounding the Misfire Report weighs in favour of the disclosure of the personal information in dispute. Previous orders have found that public knowledge is a relevant circumstance that may weigh in favour of disclosure.[23]

[30] Based on the evidence before me, I find that the applicant has established that some information about individuals named in the Misfire Report is publicly known. However, the applicant has not demonstrated that the specific information in dispute is publicly known. Having reviewed this information, I can tell by its contents that it was not publicly known. Given this, I am not satisfied that public knowledge weighs in favour of disclosure in this case.

Applicant's existing knowledge

[31] The applicant also says that the individual subjects of the investigation at issue were all known to her.[24] I take this as an argument that the applicant's pre-existing knowledge weighs in favour of disclosure. Previous orders have found that the fact that an applicant already knows the third party personal information in dispute is a relevant circumstance that may weigh in favour of disclosure.[25]

[32] While the applicant may know the identity of all the individual subjects of the investigation, nothing in the applicant's submissions or the content of the email itself suggests that the applicant knows the specific details about the two third parties the email relates to. Therefore, I am not satisfied that the applicant's knowledge is a relevant circumstance that weighs in favour of disclosure.

Sensitivity of the information

[33] While neither party made submissions respecting the sensitivity of the personal information at issue, I find it a relevant circumstance in this case. Past orders have treated the sensitivity of the personal information at issue as a relevant circumstance. For example, where personal information is innocuous and not sensitive in nature, past orders have found that its disclosure would not

[22] Applicant's response submission at paras. 26-27.
[23] For example, see Order 01-53, 2001 CanLII 21607 (BC IPC) at para. 77; and Order F08-20, 2008 CanLII 66914 (BC IPC) at paras. 40-43.
[24] Applicant's response submission at para. 27.
[25] For example, see Order F17-02, 2017 BCIPC 2 at paras. 28-30; Order 03-24, 2005 CanLII 11964 (BC IPC) at para. 36; and Order F15-14, 2015 BCIPC 14 at paras. 72-74

constitute an unreasonable invasion of personal privacy.[26] Conversely, if information is particularly sensitive or private in nature, this factor may weigh against disclosure.[27]

[34] In this case, I find the personal information about the third parties' conduct and experience of workplace discipline highly sensitive. In my view, the sensitive nature of the information in dispute weighs heavily against disclosure.

Conclusion – section 22

[35] I find that the information withheld under s. 22(1) in the email is third party personal information. The s. 22(3)(d) presumption against releasing personal information related to employment or occupational history applies to this personal information. I am not satisfied that any relevant circumstances weigh in favour of disclosure. Additionally, the sensitive nature of the personal information in the email weighs against its disclosure. Therefore, the presumption has not been rebutted. In short, I find that s. 22(1) requires the PSA to withhold all the information in dispute in the email.

CONCLUSION

[36] For the reasons given above, under s. 58 of FIPPA, I confirm the PSA's decision to withhold the severed information in the email.

June 16, 2020

ORIGINAL SIGNED BY

Laylí Antinuk, Adjudicator

OIPC File No.: F17-73057

[26] For example, see Order F08-20, 2008 CanLII 66914 (BC IPC) at para. 44; Order F17-13, 2017 BCIPC 14 at para. 62; Order F16-06, 2016 BCIPC 7 at para. 38; Order F14-45, 2014 BCIPC 48 at para. 58; Order F16-38, 2017 BCIPC 14 at paras. 114 and 149; and Order F14-39, 2014 BCIPC 42 at paras. 54 and 59.

[27] For example, see Order F17-39, 2017 BCIPC 43 at paras. 120-121; and Order F15-52, 2015 BCIPC 55 at para. 46.