Order F20-40

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 39 (VANCOUVER)

Laylí Antinuk
Adjudicator

September 22, 2020

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Summary: The applicant requested information related to a workplace investigation from the Vancouver School Board. The School Board provided some information but withheld the rest under both ss. 19(1)(a) (threat to health or safety) and 22 (unreasonable invasion of third party personal privacy) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator found that s. 19(1)(a) authorized the School Board to withhold all the information in dispute, so she did not need to decide if s. 22 also applied.

Statute Considered: *Freedom of Information and Protection of Privacy Act*, s. 19(1)(a).

INTRODUCTION

[1] The applicant requested that the Board of Education of Vancouver School District No. 39 (Vancouver) (the School Board) provide her with information related to a workplace investigation into bullying and harassment. The School Board provided some information, but withheld most of the responsive records in their entirety under both ss. 19(1)(a) (threat to health or safety) and 22 (unreasonable invasion of third party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the School Board's decision to withhold information. Mediation by the OIPC did not resolve the issues and the matter proceeded to inquiry.

[3] Both parties provided submissions for the inquiry. The School Board provided some of its submissions *in camera* with the OIPC's approval.

ISSUES

[4] In this inquiry, I will decide whether ss. 19(1)(a) and/or 22 authorize or require the School Board to withhold the information in dispute.

[5] The School Board bears the burden of proving that s. 19(1)(a) applies.[1] It also must prove that the information withheld under s. 22 is personal information.[2] The applicant bears the burden of proving that disclosing any personal information at issue would not constitute an unreasonable invasion of third party personal privacy.[3]

DISCUSSION

Background

[6] The applicant's access request relates to a workplace investigation into allegations that elected School Board trustees had bullied and harassed School Board employees (the investigation).[4] Before the investigation began, six employees, who were members of the School Board's senior management team, departed on medical leave. The School Board then hired an independent investigator to look into the bullying and harassment allegations that had surfaced. Concurrently, WorkSafeBC investigated the same allegations. Prior to the completion of either investigation, the Minister of Education removed all the elected trustees from office.

[7] The applicant worked as an elected trustee of the School Board and was one of the individuals under investigation and removed from office. Ultimately, the School Board's investigator concluded that the applicant and other trustees had bullied and harassed School Board employees by engaging in conduct that demeaned, humiliated and belittled them. In her report, the investigator also noted that she was struck by the scope and intensity of the fear of reprisal expressed by many of those who participated in the investigation. The WorkSafeBC investigation also concluded that the applicant and other trustees had bullied School Board employees.

[8] As part of the School Board investigation, the investigator conducted witness interviews during which she took notes (interview notes). Upon completion of the investigation, the investigator prepared a report of her findings.

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[1] Section 57(1).
[2] Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 10-11. See also Order F19-38, 2019 BCIPC 43 at para. 143.
[3] Section 57(2).
[4] The information summarized in the background section comes from the Manager's Affidavit #2 at paras. 4, 6, 8, 10-11, 14, 19, 20 and 33; and the School Board's initial submission at paras. 3-4, 9-10, 13, 15, 57, 62 and 65-66.

The School Board publicly released a redacted copy of the report citing public interest in the investigation, but it did not release the interview notes or the identity of the witnesses.

[9] The applicant requested a complete copy of all the investigator's notes, including the interview notes. Upon receiving this request, the School Board sent notices to the third party witnesses.[5] Following consultations with the witnesses, the School Board provided the applicant with a copy of the notes the investigator took during her interview with the applicant, but withheld all the other interview notes in their entirety under ss. 19 and 22.

Information in dispute

[10] The information in dispute comprises 228 pages of hand-written notes taken by the investigator in witness interviews during the School Board investigation.[6] Broadly speaking, the notes identify the witnesses by name and occupation and record their work place experiences.

[11] I will begin with a discussion of s. 19(1)(a).

Threat to health or safety – section 19(1)(a)

[12] Section 19(1)(a) permits a public body to refuse to disclose to an applicant information, including personal information about the applicant, if its disclosure could reasonably be expected to threaten anyone else's safety or mental or physical health. This subsection contains one of the harms-based exceptions to disclosure under FIPPA. In discussing these exceptions, former Commissioner Loukidelis explained:

> … harms-based exceptions to disclosure operate on a rational basis that considers the interests at stake. What is a reasonable expectation of harm is affected by the nature and gravity of the harm in the particular disclosure exception. There is a sharp distinction between protecting personal safety or health and protecting commercial and financial interests.[7]

[13] All the harms-based exceptions in FIPPA contain the "could reasonably be expected to" language. The Supreme Court of Canada has characterized the standard imposed by this language as "a middle ground between that which is probable and that which is merely possible."[8] Meeting this standard requires

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[5] Section 23 specifies when and how a public body may or must give notice to third parties when the public body believes a requested record contains the third party's personal information and s. 22 might apply.
[6] The School Board's initial submission at para. 12.
[7] Order F08-22, 2008 CanLII 70316 (BC IPC) at para. 48.
[8] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.

proof that disclosure will result in a risk of harm that goes "well beyond the merely possible or speculative, but it need not be proved on the balance of probabilities that disclosure will in fact result in such harm."[9] The evidence the School Board provides must demonstrate "a direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure."[10] As stated by Madam Justice MacDonald in a recent BC Supreme Court decision:

> … to rely on s. 19(1)(a) of *FIPPA*, the public body does not need to prove the harm will *probably* occur if the information is disclosed. However, the mere *possibility* of harm is also not sufficient. Put another way, the test articulated by the Supreme Court of Canada is that the probability of the harm need only be reasonably expected; the test does not require probable or actual harm.[11]

[14] To summarize, the courts have made clear that s. 19(1)(a) does not require proof of actual or even probable harm. The School Board does not need to prove that if the interview notes at issue are disclosed, the witnesses will definitely, or even probably, experience threats to their safety, or their physical or mental health.[12]

[15] With these legal principles in mind, I will summarize the parties' positions and then turn to my analysis.

Parties' positions

[16] The School Board submits that s. 19(1)(a) applies to the interview notes because disclosure will threaten the mental health of the witnesses.[13] To support its position, the School Board provided seventeen sworn affidavits, including affidavits from the investigator and multiple witnesses she interviewed during the investigation. The witnesses describe the impact that the applicant's behaviour had, and continues to have, on their personal and professional lives and their mental and physical well-being. The School Board's affidavit evidence shows that many witnesses had to take sick leave or stress leave and others left their employment in order to avoid having further contact with the applicant. Some of the witnesses express significant fears that the applicant will retaliate against them if the School Board discloses the interview notes to her because she will find out about their participation in the investigation. Several of the witnesses say

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[9] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 206.
[10] *Ibid* at para. 219.
[11] *British Columbia Hydro and Power Authority v. British Columbia (Information and Privacy Commissioner),* 2019 BCSC 2128 at para. 88.
[12] *Ibid* at para. 93.
[13] The information summarized in this paragraph comes from the Manager's Affidavit #2 at paras. 38-39, 48, 50 and 54-55; and the School Board's initial submission at para. 6.

disclosure will effectively perpetuate the intimidation and bullying they already suffered.

[17] When the School Board consulted with the witnesses prior to deciding how to respond to the applicant's access request, it says that many witnesses strenuously objected to the disclosure of the interview notes.[14] The School Board says there was "a sudden resurgence of anxiety at the School District… about even the possibility that some information might be disclosed that would allow the Applicant to identify" the witnesses.[15]

[18] To support its argument, the School Board also draws my attention to the applicant's behaviour since her removal as a trustee following the investigation, which occurred over three years ago.[16] The School Board contends that the applicant has continued to engage in an ongoing pattern of intimidating conduct since her removal from office. In particular, the School Board argues that the applicant has continued to write about the investigation on social media and in community publications in intensely critical ways as recently as February 2020. For example, in recent social media postings and articles, the School Board says the applicant unfairly characterizes School Board staff who brought forward complaints of bullying and harassments as weak and overly sensitive. Consequently, the School Board says that "the fear of retaliation by the Applicant and other trustees is so pronounced that the mere prospect that the Interview Notes may be released has been a source of continuing and intense concern" for the witnesses.[17]

[19] The applicant disputes the relevance of what she calls the witnesses' "emotional" responses and argues that they should not be a factor in determining whether the records should be released.[18] She asks: "Do senior executives' feelings warrant restricting the release of documents created by those working on behalf of the public body?"[19] The applicant submits that the records are a matter of public interest and of interest to her personally. While she acknowledges that it sometimes might be important to protect the identities of vulnerable, junior staff members, the applicant contends that statements made by senior executive level staff regarding a matter of public interest do not warrant protection. The applicant further contends that the desire of senior executives to have their identities and statements in the investigation kept secret is contrary to FIPPA and the public interest.

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[14] The Manager's Affidavit #2 at para. 38
[15] The School Board's initial submission at para. 16.
[16] The information summarized in this paragraph comes from School Board's initial submission at paras. 126, 129-130 and 145.
[17] *Ibid* at para. 128.
[18] The information summarized in this paragraph comes from the applicant's submission pp. 1-3.
[19] *Ibid* at p. 1.

[20] The applicant also says that she is researching and writing a book about the BC Liberal government's time in office and she believes the interview notes may help inform her research. She claims that she has no interest in personal retaliation and says that the witnesses' alleged fears of retaliation are unfounded.

Analysis and findings

[21] For the reasons that follow, I find that the School Board has a reasonable expectation that disclosing the interview notes could threaten the witnesses' mental health.

[22] The School Board has provided ample evidence of the significant negative impacts the possibility of disclosure has had on the mental health of multiple witnesses. While some of this evidence was provided on an *in camera* basis, which restricts my ability to discuss it, I have included examples from two witness affidavits that I think best summarize and encapsulate what all the witnesses have described to one degree or another:

> I strongly object to the disclosure of my interview notes. We were promised that there would not be an occasion on which the notes could be disclosed or made available, and I am extremely frustrated and upset that I am now having to relive these events and to consider the potential consequences for me personally, particularly if [the applicant] were to discover my identity as a participant in the investigation. However, I am more fearful and scared about what may happen to me if the notes are disclosed.
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> The mere possibility that the notes may be released has caused me harm in that I have had to re-live these events and have experienced renewed stress and anxiety. I am experiencing anxiety, perseveration, insomnia. I have had to frequently reach out the friends and family for support and reassurance through this process. Even the process of preparing this Affidavit has caused me to relive the events of several years ago. I am shocked by how strongly I still feel about these events and how they continue to weigh on me.[20]

[23] Another witness describes their experience this way:

> My feelings of anxiety are heightened thinking that information I believed would be confidential may be disclosed and used to attack myself [or] other people involved in the incidents in the 2015/2016 school year. I have extreme [*sic*] sense of angst knowing that particular individuals may get their hands on this information, especially [the applicant].[21]

[20] Witness E's Affidavit at paras. 18-19.
[21] Witness J's Affidavit at para. 13.

All the witnesses' affidavits expressed similar experiences of fear and anxiety at the mere possibility of disclosure.[22]

[24] In addition, the witnesses and the investigator all say that the investigator assured them that their participation in the investigation would be kept entirely confidential. The investigator indicates that she told all the witnesses that her practice was to destroy all interview notes.[23] She also says that, in the course of her more than twenty year career performing many dozens of investigations, she:

> … never experienced the degree or concern or fear among witnesses as I did in this case. The witnesses I met with were deeply concerned that the investigation process remain confidential. Indeed, they were concerned not just for their jobs and relationships within the work place, but they were concerned about much broader repercussions for them within the community should their participation in the investigation become known.
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> The witnesses that I spoke to were particularly fearful of [the applicant], indicating that that [*sic*] they believed she could and would do anything to exact revenge on individuals who spoke against her in the investigation. Witnesses described a culture of fear within the School District, and the fears were directly attributed to the conduct of the Applicant. Witnesses were literally terrified that they might get on the Applicant's "bad side"…
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> The level of concern and fear in this case was significant and unusual in that every witness interviewed expressed the same or similar concerns. Many witnesses were emotional and anxious in the interview. Many reported feeling stressed by their decision to participate.[24]

[25] Section 19(1)(a) protects against threats to an individual's mental health. Previous orders have found that threats to mental health do not include merely feeling upset, inconvenienced, or unpleasant – rather, s. 19(1)(a) requires serious mental distress or anguish.[25] Distress means severe trouble, anxiety or sorrow; anguish means severe misery or mental suffering.[26]

[26] In my view, the mental impacts involved in this case rise above mere inconvenience, upset or unpleasantness to the level of serious mental distress or anguish. The witnesses have consistently described experiencing severe anxiety

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[22] For example, Witness A's Affidavit at para. 7; Witness B's Affidavit at paras. 3, 6, 9 and 18; Witness C's Affidavit at paras. 11-12; Witness D's Affidavit at paras. 14-16; Witness E's Affidavit at paras. 10-11 and 14; Witness F's Affidavit at paras. 9 and 11; Witness G's Affidavit at para. 8; Witness H's Affidavit at paras.12-14; Witness I's Affidavit at para. 10; Witness J's Affidavit at paras. 11 and 13; Witness K's Affidavit at paras. 8 and 10; Witness L's Affidavit at paras. 20-21, 26 and 28-34; and Witness M's Affidavit at paras. 14 and 19-20.
[23] Investigator's Affidavit at para. 7.
[24] *Ibid* at paras. 4-6.
[25] For example, see Order 01-15, 2001 CanLII 21569 (BC IPC) at para. 74.
[26] *Canadian Oxford Dictionary*, 2nd ed, (Ontario: Oxford University Press Canada, 2004) sub verbis "distress" and "anguish".

and intense fear about the possibility of disclosure. Some witnesses are experiencing insomnia. Many have expressed feeling as though they are re-living the bullying and harassment they suffered years ago at the mere prospect of disclosure.

[27] I have no hesitation whatsoever in concluding not only that disclosure could reasonably be expected to threaten the mental health of the witnesses, but also that the possibility of disclosure is already threatening their mental health. Much like a previous order decided by former Commissioner Loukidelis, I find that the applicant's access request is forcing the witnesses to:

> "relive their fears, and I believe that this fact alone is re-victimizing" [reference omitted] I regard this concern of preventing any re-victimization of the applicant's former colleagues as a critical consideration in this present inquiry… Because of the sensitive nature of the records in dispute, especially the fact that they are the records of a workplace harassment investigation, I find that they should be withheld under section 19(1).[27]

[28] The applicant argues that the "feelings" and "emotions" of the witnesses are not relevant. I reject this argument. By specifically including mental health in s. 19(1)(a), the Legislature clearly intended that public bodies would carefully consider the emotional well-being of individuals when deciding whether to provide access to information requested under FIPPA.

[29] The applicant also says she does not intend to retaliate against the witnesses, so their fears are unfounded. I am not persuaded that the witnesses' fears respecting retaliation are unfounded. The School Board provided copies of tweets from the applicant, some of which are very recent. In these tweets, the applicant:[28]

- Refers to the six School Board employees who departed on medical leaves during the time they were experiencing bullying and harassment as the "sick leave six".
- Refers to School Board staff as having "delicate feelings".
- Says she is glad the School Board released the investigation report publicly so that "people could read for themselves to see what constitutes bullying of senior executives these days (good grief)."
- Says "those delicate-feelinged senior managers had to (the horrors!) witness trustees not being polite to each other, or something. FFS."[29]

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[27] Order No. 138-996, 1996 CanLII 1015 (BC IPC) at pp. 8-9.
[28] The Paralegal's Affidavit at Exhibit A.
[29] I note that this tweet appears to be about a different bullying investigation and report that occurred in the Victoria School District. In the tweet thread, the applicant compares the Victoria District investigation with the Vancouver School Board investigation and draws many similarities, including this one which relates to findings of ambient bullying.

[30] Two separate, independent investigations found that bullying and harassment had occurred, yet the applicant's public statements deprecate and minimize the experience of the victims of that bullying and harassment. Given the applicant's social media statements, I find it understandable that the witnesses fear retaliation from the applicant if she learns about their participation in the investigation. In my view, the applicant's twitter activity and her news articles suggest that she will likely continue to use the public forum to express her displeasure with, and criticism of, anyone who participated in the investigation. I find that disclosure of the interview notes could reasonably be expected to threaten the mental health of the witnesses because it will cause them to fear that they will be ridiculed publicly.

[31] Taking all this into account, I find that the School Board has provided sufficient evidence to establish a threat to the mental health of the witnesses that goes well beyond the merely possible or speculative. In my view, the School Board has a reasonable expectation that disclosing the interview notes could threaten the mental health of the witnesses by forcing them to re-live the bullying and harassment they experienced in the workplace and causing them to intensely fear retribution. As a result, I find that s. 19(1)(a) applies to the information in dispute. Given my findings respecting s. 19(1)(a), I will not consider whether s. 22 also applies because it is not necessary to do so.

CONCLUSION

[32] For the reasons given above, under s. 58 of FIPPA, I confirm the School Board's decision to withhold the interview notes under s. 19(1)(a).

September 22, 2020

ORIGINAL SIGNED BY

Laylí Antinuk, Adjudicator

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