



Order F21-17

BC TRANSIT

Laylí Antinuk
Adjudicator

April 30, 2021

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Summary: An applicant requested access to all records about himself held by BC Transit. BC Transit withheld some information in the responsive records under s. 22(1) (unreasonable invasion of third-party privacy). This order addresses BC Transit's decision to withhold the name of one of its employees under s. 22(1). The adjudicator found that s. 22(1) applies to the name of the employee in the circumstances.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 22(1), 22(2)(e), 22(2)(f), 22(2)(h), 22(3)(d), 22(4)(a), 22(4)(e).

INTRODUCTION

[1] The applicant requested that BC Transit provide him with all the information it had about him. BC Transit withheld some information in the responsive records under s. 22(1) (unreasonable invasion of third-party 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 BC Transit's decision to withhold information. Mediation resolved all but one of the issues between the parties. The remaining issue has proceeded to inquiry.

[3] BC Transit provided inquiry submissions, but the applicant did not.

ISSUE

[4] In this inquiry, I will decide whether s. 22(1) applies to the information in dispute.

[5] The applicant bears the burden of proving that disclosing the personal information at issue would not constitute an unreasonable invasion of third party personal privacy.¹

DISCUSSION

Background

[6] In 2018, the applicant was involved in an incident that occurred on a bus (the incident).² The incident began when the applicant got onto a bus and requested that the bus driver call the RCMP. The exchanges between the applicant and the bus driver devolved into disrespectful communication and some other passengers joined in, ultimately calling for the bus driver to be fired. The bus driver called a Transit supervisor, who arrived and took the bus driver off shift.

Information in dispute

[7] The only information in dispute in this inquiry is the name of the bus driver. BC Transit withheld the bus driver's name in three records related to the incident (collectively, the reports):

1. An operator's report;
2. An activity report; and
3. An incident report.

The bus driver's first and/or last name appears a total of 11 times in the reports.³

[8] I note that BC Transit also applied s. 22(1) to withhold other information in the responsive records, but the applicant confirmed during mediation at the OIPC that he only seeks disclosure of the bus driver's name. In other words, the applicant does not dispute BC Transit's decision to withhold other information under s. 22(1), so I will not consider that information here.

Applicant's position

[9] As noted, the applicant did not provide a submission for this inquiry. However, in his initial request for review to the OIPC, the applicant states that he is "entitled to know the name of the employee [involved in the incident]. A public

¹ Section 57(2).

² The information summarized in this Background section comes from BC Transit's submission at p. 2. I accept this uncontested evidence, which summarizes information contained in the responsive records.

³ I note that the OIPC Investigator's Fact Report states that the bus driver's name appears three times in the records, but I find that it appears 11 times.

servant in the course of their duties may have a reasonable expectation of some privacy, but I do not believe this extends to their name.”⁴

Unreasonable invasion of third-party privacy – section 22

[10] Section 22(1) requires public bodies to refuse to disclose personal information if disclosure would constitute an unreasonable invasion of a third party’s personal privacy.

[11] The analysis under s. 22 involves four steps:⁵

- 1) Determine whether the information in dispute is personal information.
- 2) Determine whether any of the circumstances described in s. 22(4) apply. If they do, then disclosure is *not* an unreasonable invasion of personal privacy.
- 3) Determine whether any of the presumptions listed in s. 22(3) apply. If they do, disclosure is *presumed* to be an unreasonable invasion of personal privacy. Presumptions may be rebutted by considering all the relevant circumstances (the next step in the analysis).
- 4) Consider the impact that disclosure would have in light of all the relevant circumstances, including those listed in s. 22(2). Do the relevant circumstances weigh in favour of or against disclosure?

Personal information

[12] FIPPA defines personal information as recorded information about an identifiable individual other than contact information.⁶ 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.⁷

[13] 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, and their business telephone number, address, email or fax number.

⁴ Applicant’s November 27, 2018 request for review.

⁵ For example, see Order 01-53, 2001 CanLII 21607 (BC IPC) at paras. 22-24.

⁶ Schedule 1 of FIPPA contains its definitions.

⁷ For examples, see Order F16-38, 2016 BCIPC 42 at para. 112; and Order F13-04, 2013 BCIPC 4 at para. 23.

[14] I find that the bus driver's name is his personal information. The name does not appear in the reports to enable others to contact the bus driver at his work, so it is not contact information in this context.

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

[15] The next 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. Given the nature of the information in dispute and BC Transit's submissions, I will discuss ss. 22(4)(a) and (e).

Third party consent – s. 22(4)(a)

[16] Section 22(4)(a) says that if a third party consents to or requests disclosure in writing, then disclosure is not an unreasonable invasion of that third party's personal privacy. BC Transit asked the bus driver if he would consent to the release of his name to the applicant. The bus driver refused.⁸ Therefore, I find that s. 22(4)(a) does not apply.

Position, function or remuneration – s. 22(4)(e)

[17] As noted, the disputed information in this case is the bus driver's name. While the bus driver no longer works for BC Transit,⁹ at the time the records were created, he was working as a public body employee. Previous orders have held that the names of a public body's employees generally fall under s. 22(4)(e).¹⁰ Under s. 22(4)(e), the disclosure of personal information about a third party's "position, functions, or remuneration" as an officer, employee or member of a public body or a member of a minister's staff is not an unreasonable invasion of personal privacy.

[18] Past orders have held that s. 22(4)(e) applies to personal information about an employee's job duties in the normal course of work-related activities, such as objective factual information about what employees said or did in the normal course of doing their jobs, but not qualitative assessments or evaluations of such actions.¹¹ Qualitative assessments or evaluations of an employee's actions fall under s. 22(3)(d). Under s. 22(3)(d), disclosure of personal information that relates to a third party's employment, occupational or

⁸ Information and Privacy Officer's Statutory Declaration at para. 3; BC Transit's submission at p. 3.

⁹ Information and Privacy Officer's Statutory Declaration at para. 6.

¹⁰ Order 01-15, 2001 CanLII 21569 (BC IPC) at para. 35; and Order 04-20, 2004 CanLII 45530 (BC IPC) at para. 18. The BC Supreme Court found this interpretation of s. 22(4)(e) reasonable in *British Columbia Hydro and Power Authority v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 2128 at paras. 70-71.

¹¹ Order 01-53, 2001 CanLII 21607 (BC IPC) at paras. 40-41.

educational history is presumed to constitute an unreasonable invasion of third-party personal privacy.

[19] Numerous decisions have addressed the distinction between information about the position, functions or remuneration of a public body employee (s. 22(4)(e)), and information that relates to employment history (s. 22(3)(d)).¹² The context in which the disputed information appears determines whether s. 22(4)(e) or s. 22(3)(d) applies.¹³ For example, in Order 01-53, former Commissioner Loukidelis found that an employee's name – normally captured by s. 22(4)(e) – formed part of that employee's employment history under s. 22(3)(d) because it appeared in the context of a workplace investigation.¹⁴

[20] While BC Transit does not make submissions that specifically address s. 22(4)(e), it does argue that the bus driver's name forms part of his employment history under s. 22(3)(d) because it appears in reports that involve complaints about his conduct at work.¹⁵

[21] Given the context of this case, I find that s. 22(4)(e) does not apply to the bus driver's name. Having reviewed the information in the reports, I agree with BC Transit's submission that the bus driver's name appears in records that involve complaints about his conduct at work. The reports indicate that more than one person complained to the Transit supervisor who arrived on the scene of the incident about the bus driver's behaviour and at least one called for him to be fired. In addition, the incident report shows that the applicant made a formal complaint to BC Transit about the bus driver's conduct. BC Transit then investigated that complaint.

[22] In these particular circumstances, I find that the bus driver's name is inherently tied to qualitative assessments or evaluations of his actions, particularly because the applicant was one of the people who complained about the bus driver's conduct. Therefore, I find that s. 22(4)(e) does not apply.

[23] I have considered the other subsections of s. 22(4) and find none of them applicable here.

Presumed unreasonable invasion of privacy – section 22(3)

[24] The third step in the s. 22 analysis requires determining whether any of the presumptions in s. 22(3) apply to the personal information at issue. Section

¹² For examples, see Order No. 97-1996 (online at: <https://www.oipc.bc.ca/orders/278>); Order 00-53, 2000 CanLII 14418 (BC IPC); Order 01-53, 2001 CanLII 21607 (BC IPC); and Order F05-32, 2005 CanLII 39586 (BC IPC).

¹³ Order F10-21, 2010 BCIPC 32 at para. 22.

¹⁴ *Supra* note 11.

¹⁵ BC Transit's submission at p. 4.

22(3) lists circumstances in which disclosure of personal information is presumed to constitute an unreasonable invasion of third-party personal privacy.

[25] As described above, BC Transit submits that the presumption in s. 22(3)(d) applies to the bus driver's name in the circumstances because it relates to his employment history. For the reasons identified in paragraphs 21-22, I agree. Past orders have held that s. 22(3)(d) applies to information and allegations of wrongdoing in the workplace.¹⁶ As I see it, given the circumstances, the bus driver's name is information that relates to allegations of wrongdoing in the workplace which, in turn, led to an investigation. Consequently, I find that s. 22(3)(d) applies to the bus driver's name, meaning that its disclosure is presumed to constitute an unreasonable invasion of third-party personal privacy.

[26] I have considered the other presumptions in s. 22(3) and find that none of them apply to the bus driver's name.

Relevant circumstances – section 22(2)

[27] The last step in the s. 22 analysis requires a consideration of all the relevant circumstances to determine whether disclosure of the personal information at issue would constitute an unreasonable invasion of personal privacy. The relevant circumstances might rebut the s. 22(3)(d) presumption discussed immediately above.

[28] Section 22(2) lists some relevant circumstances to consider at this stage. BC Transit submits that ss. 22(2)(e), (f) and (h) all weigh in favour of withholding the bus driver's name. I will discuss each subsection in turn.

Unfair exposure to harm – section 22(2)(e)

[29] Section 22(2)(e) asks whether disclosure will unfairly expose a third party to financial or other harm. 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

[30] BC Transit argues that "it may be fairly assumed" that the bus driver "would find further contact with the Applicant or others relating to this incident harmful."¹⁹ BC Transit says the incident included several people becoming hostile

¹⁶ Order 01-53, 2001 CanLII 21607 (BC IPC) paras. 32-36.

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 BC Transit's submission at p. 5.

and using raised voices, and notes that the bus driver described the experience as “horrible” in the operator’s report.

[31] While I agree that the incident was clearly upsetting for the bus driver, I am not satisfied that this rises to the type or level of harm required by s. 22(2)(e). As described above, this section requires serious mental distress or anguish that goes beyond embarrassment, upset, or a negative reaction. BC Transit provides no evidence to show that the bus driver will be exposed to serious mental distress or anguish if his name is disclosed.

[32] I find that s. 22(2)(e) does not weigh in favour of withholding the bus driver’s name.

Information supplied in confidence – section 22(2)(f)

[33] Section 22(2)(f) asks whether the personal information at issue was supplied in confidence.

[34] BC Transit submits that the bus driver worked as a unionized employee at the time the records came into existence.²⁰ BC Transit’s evidence shows that matters pertaining to a unionized employee’s employment are resolved through a collective agreement grievance process that is not typically public. BC Transit says its employees do fill out reports at the request of BC Transit, but they are not asked to waive their rights to privacy in the process. Accordingly, BC Transit contends that the information in the reports (including the bus driver’s name) was supplied in confidence.

[35] I am not persuaded by BC Transit’s arguments about confidentiality given the nature of the records and the personal information at issue. As I have said, the personal information at issue is the driver’s name, which appears 11 times in the reports. Nothing in the reports themselves suggests that the bus driver’s name was supplied in confidence by the BC Transit employees who prepared the reports. The reports contain no markers of confidentiality. Additionally, the reports do not relate to a grievance process – they relate solely to the incident. Nothing in the evidence suggests that the bus driver engaged a union representative or a grievance process in relation to the incident. I find that s. 22(2)(f) does not weigh in favour of withholding the bus driver’s name.

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

[36] Section 22(2)(h) asks whether disclosure may unfairly damage the reputation of a person referred to in the records.

²⁰ The information summarized in this paragraph comes from BC Transit’s submission at p. 4 and the Information and Privacy Officer’s Statutory Declaration at paras. 4-5.

[37] BC Transit says the bus driver's reputation "is squarely in issue" because the reports describe him as the subject of criticism.²¹ Therefore, BC Transit says publicly identifying the bus driver would expose him unfairly to reputational harm. Given the circumstances of this case, I agree.

[38] The incident report indicates that, at one point, the applicant told BC Transit that he would post a video of the incident he had on YouTube.²² The applicant has said he believes he is entitled to know the name of the bus driver, and has taken his belief as far as this inquiry. Taking all this into account and without any submissions from the applicant to show otherwise, I find it reasonable to infer that disclosure may expose the bus driver to reputational harm in the form of a YouTube video posting that identifies him by name and shows certain aspects of the incident.

[39] In my view, such reputational harm would be unfair because the bus driver would not necessarily find out that the video had been posted and, even if he did, he would have no ability to defend himself or provide his perspective on the incident. For example, given the nature of the incident, I find it unlikely that any potential YouTube video posting would be followed by a public proceeding in which the bus driver could potentially repair his reputation by proving that his actions were appropriate.

[40] In these particular circumstances, I find that s. 22(2)(h) weighs in favour of withholding the bus driver's name.

[41] I have considered the other circumstances listed in s. 22(2) and find none of them relevant here.

Conclusion – section 22

[42] I find that the bus driver's name is personal information. The presumption against releasing personal information that relates to a third party's employment history applies to this information given the facts of this particular case. None of the relevant circumstances weigh in favour of disclosure and the relevant circumstance related to unfair reputational harm weighs against disclosure, so the presumption stands. Additionally, the applicant did not provide an inquiry submission and he bears the burden of proving that disclosure would not constitute an unreasonable invasion of third-party personal privacy.

²¹ BC Transit's submission at p. 4.

²² Incident report at p. 1. I note that the incident report also says that the applicant later told a BC Transit employee that he would not post his video on YouTube (at p. 4). However, nothing in the evidence before me suggests that the applicant has since deleted the video or still does not intend to post it.

[43] Taking all this into account, I find that s. 22(1) applies to the bus driver's name.

CONCLUSION

[44] For the reasons given above, under s. 58 of FIPPA, I confirm BC Transit's decision to withhold the bus driver's name under s. 22(1).

April 30, 2021

ORIGINAL SIGNED BY

Laylí Antinuk, Adjudicator

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