VANCOUVER POLICE DEPARTMENT

Order F21-19

Celia Francis
Adjudicator

May 12, 2021

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Summary: An applicant requested access under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Vancouver Police Department (VPD) file on its investigation into allegations of rape and sexual assault against him. The VPD disclosed some of the responsive records, withholding some information under s. 15 (harm to law enforcement) and s. 22 (unreasonable invasion of third-party personal privacy). The adjudicator found that s. 22 applied to the information in dispute and ordered the VPD to refuse the applicant access to it. It was not necessary to consider s. 15.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 4(2), 22(1), 22(2)(c), 22(2)(e), 22(2)(f), 22(3)(b).

INTRODUCTION

[1] In late 2017, a young woman alleged that her uncle by marriage raped and sexually assaulted her. The Vancouver Police Department (VPD) investigated the allegation but decided not to recommend criminal charges against the uncle, as there was not enough evidence.[1]

[2] The uncle (applicant) later requested the VPD's file on its investigation of the allegations, under the *Freedom of Information and Protection of Privacy Act* (FIPPA). The VPD disclosed some records, withholding information under ss. 15(1)(a) and 22(3)(b) of FIPPA.[2]

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[1] Disclosed information on page 15 of the 74 pages of responsive records says that the VPD closed the file as the investigator "did not believe there was enough evidence to go off for charge approval".

[2] Section 15(1)(a) permits a public body to withhold information where its disclosure could reasonably be expected to harm a law enforcement matter. Section 22(3)(b) says that disclosure

[3] The applicant requested a review of the VPD's decision by the Office of the Information and Privacy Commissioner (OIPC). During mediation by the OIPC, the VPD decided to apply s. 15(2)(b) of FIPPA to some of the information.[3] Mediation did not resolve the issues in dispute and the matter proceeded to inquiry. The OIPC received submissions from the applicant and the VPD.

[4] In its initial submission, the VPD said it was no longer relying on s. 15(1)(a), so I need not consider it.[4] In addition, for reasons I discuss below, I have decided that s. 22(1) applies to all of the withheld information. I do not, therefore, need to consider if s. 15(2)(b) applies to some of the same information.

ISSUE

[5] The issue to be decided in this inquiry is whether the VPD is required by s. 22(1) to withhold the information in dispute.

[6] Under s. 57(2) of FIPPA, the applicant has the burden of proving that disclosure of personal information about a third party would not be an unreasonable invasion of the third party's personal privacy.

DISCUSSION

Information in dispute

[7] The 74 pages of responsive records consist of occurrence reports,[5] statements by the victim, witnesses and others, officers' notes and property reports.

[8] The VPD disclosed to the applicant his own interview statements, his wife's interview statements (with her consent), their identifying information, headings, the VPD investigators' names and contact information, dates and some general information on the VPD investigators' steps in the investigation, as well as the VPD's reasons for closing the file.

[9] The VPD withheld identifying information about the victim, witnesses and others whom the VPD interviewed, their written statements and other information

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of a third party's personal information is presumed to be an unreasonable invasion of third-party personal privacy if the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

[3] Section 15(2)(b) permits a public body to withhold information if the information is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or a person who has been quoted or paraphrased in the record.

[4] The VPD also said it had disclosed one additional page to the applicant, after the OIPC issued the notice for this inquiry; VPD's initial submission, para. 4

[5] The occurrence reports set out the steps the VPD investigators took, as well as information they obtained from the victim, witnesses and others.

they provided to the investigators during interviews, property reports and some information about the results of the investigation. This withheld information is the information in dispute.

[10] The applicant said he does not require the victim's identity, as he already knows it,[6] so I have not considered this information. The applicant's response submission suggests that he is mainly interested in the statements the VPD obtained. I have, however, considered all of the withheld information (except the victim's identity), as this was the issue as set down for inquiry.

Unreasonable invasion of third-party personal privacy – s. 22(1)

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

> Numerous orders have considered the approach to s. 22 of FIPPA, which states that a "public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy." This section only applies to "personal information" as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.[7]

Is it personal information?

[12] FIPPA defines "personal information" as recorded information about an identifiable individual, other than contact information. "Contact information" is defined in Schedule 1 of FIPPA as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."

[13] The VPD argued that the information in dispute is personal information.[8] The applicant said that the statements about his conduct are his personal information and thus not personal information for the purposes of s. 22.[9]

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[6] Applicant's response submission, para. 16.
[7] Order F15-03, 2015 BCIPC 3 (CanLII), at para. 58.
[8] VPD's initial submission, paras. 13-14.
[9] Applicant's response submission, paras. 7, 50 and 55.

[14] Most of the information in dispute is about identifiable third parties, principally the victim, as well as witnesses and others. I find that it is personal information.

[15] A small amount of the information in dispute is about the alleged interactions between the applicant and the victim as identifiable individuals. It is thus joint information about both individuals and I find that it is also personal information.

[16] The VPD also withheld some non-personal information, such as headings, on the pages containing the third-party personal information. I deal with this information below in my discussion of severing under s. 4(2).

Does s. 22(4) apply?

[17] Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. The VPD did not address this provision. The applicant argued it does not apply.[10]

[18] There is, in my view, no basis for finding that s. 22(4) applies here. The personal information at issue does not, for example, relate to any third party's position, functions or remuneration as an officer, employee or member of a public body (s. 22(4)(e)). I find that s. 22(4) does not apply.

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

[19] Section 22(3) sets out information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. The VPD argued that s. 22(3)(b) applies.[11] The applicant argued that it does not.[12]

[20] Section 22(3)(b) reads as follows:

> 22 (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
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> …
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,
> …

[10] Applicant's response submission, para. 50(b).
[11] VPD's initial submission, paras. 7-32.
[12] Applicant's response submission, paras. 8-10.

[21] I agree with Order 01-12,[13] where former Commissioner Loukidelis found that, for the purposes of s. 22(3)(b):

> ... "law" refers to (1) a statute or regulation enacted by, or under the statutory authority of, the Legislature, Parliament or another legislature, (2) where a penalty or sanction could be imposed for violation of that law. ...[14]

[22] The VPD referred to its law enforcement mandate under s. 34(2) of the *Police Act* as the basis for applying s. 22(3)(b).[15] Although the VPD did not say so explicitly, I infer that it also means that it conducted the investigation to determine if there had been a possible violation of the *Criminal Code*.[16]

[23] The applicant argued that s. 22(3)(b) does not apply to his own personal information (i.e., statements about his conduct in relation to the accusation of sexual assault).[17]

[24] I am satisfied that the records relate to a criminal investigation that the VPD undertook into allegations of rape and sexual assault. All of the third-party personal information in dispute was clearly compiled and is identifiable as part of a police investigation into a possible violation of law. I find, therefore, that s. 22(3)(b) applies to this information. This means its disclosure is presumed to be an unreasonable invasion of third-party privacy.

Relevant Circumstances

[25] Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy. It is at this stage that the s. 22(3)(b) presumption may be rebutted.

[26] The VPD did not expressly address this issue, although it did express concern about the possible effect of disclosure on the victim.[18] I take this to refer indirectly to s. 22(2)(e).

[27] The applicant argued that, if there is a presumed unreasonable invasion of third-party privacy on disclosure of his own personal information, that presumption is rebutted in this case. He raised ss. 22(2)(c), (e) and (f) as

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[13] Order 01-12, 2001 CanLII 21566 (BC IPC).
[14] At para. 17.
[15] VPD's initial submission, paras. 18-32.
[16] R.S.C., 1985, c. C-46.
[17] Applicant's response submission, paras. 8-10.
[18] VPD's initial submission, para. 34.

relevant circumstances, as well as his strong connection to, and knowledge of, the information.[19]

[28] Sections 22(2)(c), (e) and (f) read as follows:

> 22(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
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> …
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> (c) the personal information is relevant to a fair determination of the applicant's rights,
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> …
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> (e) the third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence,
>
> …

[29] **Fair determination of rights – s. 22(2)(c) –** Past orders have set out a four-part test to determine whether s. 22(2)(c) applies:

> 1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
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> 2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
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> 3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
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> 4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.[20]

[30] The applicant said he is "contemplating a civil action for defamation against the alleged victim over her defamatory accusations [to the VPD] that he sexually assaulted her."[21] The applicant noted that:

> A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's

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[19] Applicant's response submission, paras. 11 and 51.
[20] See, for example, Order 01-07, 2001 CanLII 21561 (BC IPC) and Order F18-48, 2018 BCIPC 51 (CanLII).
[21] Applicant's response submission, para. 31.

> reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.[22]

[31] He argued that s. 22(2)(c) favours disclosure because his right to sue relates to a proceeding which is contemplated and the personal information he seeks is relevant to a fair determination of his rights, that is, his legal right to sue the victim for defamation in making her statements to the police.[23] The applicant argued that, under defamation law, he needs to know precisely what the victim said as part of filing his claim and thus needs the statements she and others made to the VPD. Despite this, the applicant acknowledged that he can file a notice of claim without pleading the precise accusations (i.e., without providing the statements).[24]

[32] The VPD argued that the applicant does not need the information in dispute to commence a civil claim for defamation as, under the BC Supreme Court Rules, the applicant can apply for disclosure of documents once he has commenced a civil claim and can then apply to the Courts to amend his claim. The VPD also pointed out that, under the Rules of Court, there is an implied undertaking of confidentiality as to the use or publication of such information, whereas under FIPPA there is no such restriction.[25]

[33] I accept that the applicant has a legal right to sue the victim for defamation respecting her statements to the VPD and that he is contemplating such a proceeding. I also accept that the information in dispute would have a bearing on determining the applicant's legal rights in a suit for defamation. The applicant has not, however, persuaded me that he needs the information in dispute to prepare for any such proceeding or to ensure a fair hearing. As the VPD argued and the applicant himself admitted, the applicant can begin a civil claim without the information in dispute and apply to the Courts for disclosure later. I find, therefore, that s. 22(2)(c) does not apply here.

[34] **Exposure to unfair harm – s. 22(2)(e) –** Previous orders have said that harm under s. 22(2)(e) can include mental harm, in the form of serious mental distress or anguish. However, embarrassment, upset or having a negative reaction do not rise to the level of mental harm.[26]

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[22] *Grant v. TorStar Corp*., 2009 SCC 61 (CanLII), at para. 28, which the applicant cited in his response submission, at para. 22.
[23] Applicant's response submission, para. 53.
[24] Applicant's response submission, para. 33.
[25] VPD's reply submission, paras. 4-13.
[26] Order F20-37, 2020 BCIPC 43, at para. 120.

[35] The applicant argued that the victim will not be exposed unfairly to financial or other harm.[27] He did not explain why he thinks so.

[36] The VPD argued that disclosure of the information in dispute would expose "the victim to the possibility of publication of the victim's information" and would increase "the opportunity to expose the victim to public discussion and involvement of her reporting of this event to police".[28]

[37] The applicant can already "publish" information about the victim without access to the information in dispute, as he knows her identity and the general nature of the allegations against him. However, the withheld information is extremely sensitive, even intimate, information, primarily about the victim, the alleged incident, her feelings, actions and experiences. I am satisfied that its disclosure to the man she alleged raped and sexually assaulted her could cause her serious mental distress.

[38] I find, therefore, that disclosure of the information in dispute to the applicant could expose the victim to unfair harm for the purposes of s. 22(2)(e). This factor weighs heavily in favour of non-disclosure.

[39] **Supply in confidence – s. 22(2)(f) –** The VPD did not address this factor. The applicant said that the accusations about his conduct were not supplied in confidence.[29] Again, he did not explain why he thinks so.

[40] From the nature of the incidents and the character and content of all of the withheld information, I accept that the third parties provided the personal information to the police in confidence. This factor favours withholding the information at issue.

[41] **Applicant's connection to, and knowledge of, the information –** The applicant argued that there is a strong connection between him and the information in dispute and that he has a legitimate interest in obtaining his personal information as it relates to the investigation. He also said he has knowledge, "albeit incomplete", of the withheld information as the police interviewed him "about his conduct towards that person [the victim]".[30]

[42] I acknowledge that the applicant is aware of the victim's identity and is generally aware of the allegations against him.[31] However, as noted above, the withheld information is almost entirely about the victim.

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[27] Applicant's response submission, para. 50(f).
[28] VPD's initial submission, para. 34.
[29] Applicant's response submission, para. 50(g).
[30] Applicant's response submission, paras. 55 and 60.
[31] Disclosed information on page 14 confirms this, as does the request for access.

[43] Only some of the information in dispute is about both the victim and the applicant. Disclosure of this joint, intertwined personal information would, in my view, unreasonably invade the victim's privacy due to its sensitive nature, as I described it just above.

Conclusion on s. 22(1)

[44] I found above that the information in dispute falls under s. 22(3)(b). Its disclosure is therefore presumed to be an unreasonable invasion of third-party personal privacy.

[45] I also found that s. 22(2)(c) does not apply. I found that ss. 22(2)(e) and (f) do apply, as does the sensitivity of the information. These factors weigh heavily in favour of withholding the information in dispute.

[46] I find that the applicant has not discharged his burden of proof and that s. 22(1) requires the VPD to withhold the information in dispute.

[47] The applicant suggested that the third-party personal information could be severed and the rest of the information disclosed.[32] I do not consider it would be reasonable under s. 4(2) to do this, as the result (mainly disconnected headings) would be meaningless.[33]

CONCLUSION

[48] For the reasons given above, under s. 58(2)(c) of FIPPA, I require the VPD to refuse the applicant access to the information in dispute under s. 22(1).

May 12, 2021

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File No.: F18-77659

[32] Applicant's response submission, para. 62.
[33] Under s. 4(2), if excepted information can reasonably be severed, an applicant has the right of access to the remainder of the information.