Order F21-40

ISLANDS TRUST

Elizabeth Barker
Director of Adjudication

September 7, 2021

CanLII Cite: 2021 BCIPC 48
Quicklaw Cite: [2021] B.C.I.P.C.D. No. 48

Summary: An applicant requested bylaw enforcement records related to his neighbour's property on Salt Spring Island. Islands Trust disclosed some information but refused access to the rest under several *Freedom of Information and Protection of Privacy Act* exceptions to disclosure. The adjudicator found that Islands Trust was not authorized to refuse access under ss. 15(1)(a), (c) and (l) (harm to law enforcement), but it was required to refuse access to some of the information under s. 22 (unreasonable invasion of a third party's personal privacy). Islands Trust was ordered to give the applicant access to the information it was not authorized or required to refuse to disclose.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 15(1)(a), 15(1)(c), 15(1)(l), 22(1), 22(2)(a), 22(2)(b), 22(2)(c), 22(2)(g), 22(3)(b) and 22(4)(e).

INTRODUCTION

[1] This inquiry involves two requests for records to the Islands Trust under the *Freedom of Information and Protection of Privacy Act* (FIPPA). The person who made the requests (applicant) resides on Salt Spring Island and asked for Island Trust's bylaw enforcement records related to his neighbour's property.

[2] In response, Islands Trust disclosed three pages of records but refused access to the remaining pages under ss. 15(1)(a), (c) and (l) (harm to law enforcement) and s. 22 (unreasonable invasion of a third party's personal privacy) of FIPPA.

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review Islands Trust's decisions. During mediation, Islands Trust disclosed further information. However, mediation did not resolve either file and they proceeded to inquiry. Both parties provided submissions.

Island Trust received permission from the OIPC to submit parts of its submission and evidence *in camera*.[1]

ISSUES

[4] The issues to be decided in this inquiry are as follows:

1. Is Islands Trust authorized to refuse to disclose the information under ss. 15(1)(a), (c) and/or (l) of FIPPA?

2. Is Islands Trust required to refuse to disclose the information under s. 22(1) of FIPPA?

[5] Islands Trust has the burden of proving the applicant has no right of access to the information being withheld under ss. 15(1)(a), (c) and/or (l). The applicant, however, has the burden of proving that disclosure of any personal information that relates to a third party would not be an unreasonable invasion of the third party's personal privacy under s. 22.[2]

DISCUSSION

Background

[6] Islands Trust was created by the *Islands Trust Act* (ITA) as part of a local governance structure for BC's coastal islands.[3] Section 3 of the ITA explains the purpose of Islands Trust as follows:

> The object of the trust is to preserve and protect the trust area and its unique amenities and environment for the benefit of the residents of the trust area and of British Columbia generally, in cooperation with municipalities, regional districts, improvement districts, other persons and organizations and the government of British Columbia.

[7] Islands Trust is governed by a council comprised of trustees from local trust areas.[4] Each local trust area has a local trust committee who regulates the development and use of land in their local trust area.[5] The ITA authorizes local

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[1] Only the adjudicator will see the *in camera* material, and the other party will receive the evidence or arguments with the *in camera* material redacted. If a party wishes to submit material *in camera*, they must first make a formal application to the OIPC for permission to do so.
[2] Section 57 of FIPPA states who has the burden of proof for these disclosure exceptions.
[3] *Islands Trust Act*, RSBC 1996, c 239.
[4] FIPPA applies to public bodies and Islands Trust meets the definition of "public body" in Schedule 1 of FIPPA. The definition of "public body" includes a "local public body", which, in turn, includes a "local government body", which, in turn, includes "the trust council, the executive committee, a local trust committee and the Islands Trust Conservancy, as these are defined in the *Islands Trust Act*".
[5] Section 4(4) of the ITA.

trust committees to make and enforce bylaws.[6] This case involves a Salt Spring Island Local Trust Committee's bylaw.

[8] The applicant lives on Salt Spring Island and his access requests relate to his neighbour's property (Property). Over the years, the applicant has asked Islands Trust to enforce the bylaw(s) that relate to how his neighbour is using his Property.

[9] The applicant's first access request was for the bylaw inspection reports for August 2016 and August 2018 inspections of the Property. Islands Trust refused access to the records under ss. 15(1)(a), (c), (l) and 22.[7]

[10] The applicant indicates that he made his second access request because of what he learned from the response to his first access request. He learned that Islands Trust had commenced an investigation of bylaw infractions at the Property in January 2001. As a result, he requested "disclosure of all bylaw enforcement actions taken by the Islands Trust with respect to the bylaw violations at [the Property]" in the 18.5 years since the investigation commenced. Islands Trust disclosed three pages of records but refused access to other records under ss. 15(1)(a), (c), (l) and 22.[8]

[11] Islands Trust's two responses to the access requests confirmed that there was an ongoing bylaw enforcement investigation involving the Property.[9]

The Records

[12] Initially, there were 79 pages of records in dispute. However, the applicant says that he has no interest in seeing any of the photographs in the records because he has seen the Property and inhabitants many times.[10] Therefore, I will not consider Islands Trust's refusal to disclose photographs.[11] In addition, three pages of the records have already been disclosed, so they are also not in dispute.[12]

[13] As a result, only 23 pages of records remain in dispute, specifically:

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[6] Sections 23-28 of the ITA.
[7] File F19-79920 (Applicant's May 13, 2019 access request).
[8] File F19-80293 (Applicant's July 15, 2019 access request). The three pages released were pp. 3-5.
[9] Islands Trust's June 3, 2019 and August 21, 2019 responses to the applicant's access requests.
[10] Applicant's submission at pp. 4-5.
[11] The photographs are at pp. 4-55 of the records in File F19-79920 and at p. 13 in File F19-80293.
[12] Pages 3-5 of the records in file F19-80293 are marked as "released". Islands Trust disclosed them with their March 12, 2020 decision letter.

1. A memorandum drafted by a bylaw enforcement officer (Memorandum);[13]
2. File notes made by bylaw enforcement staff (Notes);[14] and
3. Correspondence and documentation Islands Trust sent to third parties (Correspondence).[15]

[14] The records have been withheld in their entirety under s. 15(1)(a), (c) and/or (l). Section 22 has only been applied to small portions of the records.

[15] One entry in the Notes is marked as being withheld because it "does not pertain to the request."[16] Islands Trust does not explain this in its submissions. Based on my review, this entry is information that does relate to the applicant's access requests.

[16] In my view, Islands Trust is not authorized to withhold that entry in the Notes on the basis that it is not responsive to the access request. Previous orders have stated that a public body is not authorized under FIPPA to withhold a part of a responsive record on the basis that the part is not responsive.[17] A public body is only authorized to withhold information in a responsive record under the exceptions to disclosure in ss. 12 to 22.1 of FIPPA. However, I understand that Islands Trust does not want to disclose this entry in the Notes, so I will consider it under the FIPPA exceptions to disclosure that Islands Trust applied to the other information in dispute.

Disclosure harmful to law enforcement, s. 15(1)

[17] Islands Trust is refusing to disclose records under ss. 15(1)(a), (c) and (l). Those provisions say:

> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
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> (a) harm a law enforcement matter,
> ...
> (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,
> …
> (l) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

[13] File F19-79920 at pp. 1-3.
[14] File F19-79920 at pp. 56-58.
[15] File F19-80293 at pp. pp. 1-2, 6-12 and 14-21.
[16] The bottom part of p. 56 of the records for file F19-79920.
[17] Order F15-23, 2015 BCIPC 25 (CanLII); Order F15-24, 2015 BCIPC 26 (CanLII); Order F15-26, 2015 BCIPC 28 (CanLII).

[18] The Supreme Court of Canada in Ontario *(Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* said the following about the standard of proof and evidence required for exceptions, like s. 15(1), that use the language "reasonably be expected to harm":

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground…This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.[18]

[19] Islands Trust submits that its evidence establishes that there is considerably more than a mere possibility of harm occurring, and that the reasonable expectation of harm test has readily been satisfied.[19]

Do the records relate to a law enforcement?

[20] The meaning of the term "law enforcement" is relevant when considering ss. 15(1)(a) and (c) because it is used in both provisions. Schedule 1 of FIPPA defines the term as follows:

> "law enforcement" means
> (a) policing, including criminal intelligence operations,
> (b) investigations that lead or could lead to a penalty or sanction being imposed, or
> (c) proceedings that lead or could lead to a penalty or sanction being imposed;

[21] I have reviewed the records being withheld under s. 15(1) and find that they all relate to inspections and enforcement of the Salt Spring Island Land Use Bylaw No. 355.[20]

[22] Section 28 of the ITA provides for fines or other penalties for contraventions of bylaws. Section 28 says:

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[18] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 at para. 54.
[19] Islands Trust's reply submission at para. 7.
[20] This is evident based on the information in the three pages that were disclosed (pp. 3-5 of the records for F19-80293).

> 28 (1) For the purposes of enforcing its bylaws and section 32 of this Act, a local trust committee has all the power and authority of a regional district board.
>
> (1.1) Division 1 *[Bylaw Enforcement and Related Matters]* of Part 12 *[Regional Districts: Bylaw Enforcement and Challenge of Bylaws]* of the *Local Government Act*, other than section 413 (2) and sections 421 to 424, applies to a local trust committee in relation to subsection (1).
>
> (2) Fines and other penalties imposed and collected under or because of a bylaw of a local trust committee must be paid to the trust council.

[23] As noted above, the definition of the term "law enforcement" in FIPPA includes investigations and proceedings that lead or could lead to a penalty or sanction being imposed. I am satisfied the records in this inquiry are about law enforcement. This is consistent with previous orders, which have also found that enforcement and investigations of local government bylaws qualify as "law enforcement" for the purposes of s. 15(1).[21]

Section 15(1)(a) – harm a law enforcement matter

[24] While the information is about law enforcement, that is not the end of the matter. In order to establish that s. 15(1)(a) applies, Islands Trust must also show that disclosing the information could reasonably be expected to harm the law enforcement matter.

[25] Islands Trust says:

> To date, the bylaw enforcement file that the Records pertain to remains active. Disclosure of the Records will harm the bylaw enforcement file, as third parties, including any residents of the Property, will be reluctant to assist with ongoing investigations if some level of anonymity is not assured, as in Order 00-01. This leads to the conclusion that disclosure of the Records will harm this law enforcement matter."[22]

[26] Islands Trust provides affidavit evidence from its Legislative Services Manager and Corporate Secretary (CT). CT says that Islands Trust's Bylaw Compliance and Enforcement Manager (WD) told her that there is an ongoing bylaw enforcement file regarding the Property, which began over 10 years ago.[23] CT also explains, *in camera*, what specific investigation and enforcement steps have been taken on the bylaw enforcement file.[24]

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[21] For example, Order 00-01, 2000 CanLII 9670 (BCIPC) at p. 4; Order F11-03, 2011 BCIPC 3 (CanLII) at para. 30; Order F18-31, 2018 BCIPC 34 at paras. 43-44; Order F18-10, 2018 BCIPC 12 (CanLII) at para. 33.
[22] Islands Trust initial submission at para. 21.
[23] CT's affidavit at para. 3.
[24] CT's affidavit at paras. 11-12.

Islands Trust also says that disclosing the Correspondence would "disclose the nature of the steps taken so far, which would in turn permit the applicant to draw inferences as to the other steps that the Islands Trust might take."[25]

[27] Islands Trust says the Memorandum is in draft form and disclosing it could harm the enforcement options available to it.[26] CT says the Memorandum has not yet been finalized or presented to the Salt Spring Island Local Trust Committee.[27] She says, "I have concerns that the disclosure of this document may limit the enforcement options available to the Islands Trust, as disclosure would reveal law enforcement activities and could reveal the status of those activities and possible next steps."[28]

[28] The applicant disputes that disclosing the information could harm law enforcement. He says that expecting people not to cooperate with the investigation because they are concerned their cooperation might render them homeless, does not meet the level of harm required.[29] The applicant does not dispute that the enforcement is ongoing. Rather, he argues that the enforcement has had no meaningful results.

Findings, s. 15(1)(a)

[29] Most of the records in dispute are almost two years old, and one dates back 18 years. However, I find CT's evidence sufficient to establish that the bylaw enforcement matter is still active as of the date of this inquiry as there is no evidence suggesting otherwise. I am satisfied that the records relate to an ongoing bylaw enforcement matter.

[30] Islands Trust asserts that disclosure would cause third parties, including any residents of the Property, to be "reluctant to assist" with ongoing investigations if some level of anonymity is not assured. In support, Islands Trust cites Order 00-01, which also dealt with bylaw enforcement records withheld under s. 15(1)(a). However, in Order 00-01 there was evidence of a very volatile and acrimonious situation involving numerous individuals complaining about each other and the police were also involved. The facts of the present case are different and the type of evidence that existed in Order 00-01 is not present here in affidavit form or in the records themselves.

[31] I find that Islands Trust's argument and evidence do not provide the necessary level of detail to show a connection between disclosure and the alleged harm. For instance, Islands Trust has not explained how disclosing the

[25] Islands Trust initial submission at para. 27.
[26] Island Trust initial submission at para. 24.
[27] CT's affidavit at para. 6.
[28] CT's affidavit at para. 5.
[29] Applicant's submission at p. 9.

specific information in dispute could reasonably be expected to cause third parties, including any residents of the Property, to be reluctant to assist with a bylaw investigation. It is not obvious, in particular because the information appears to be innocuous and readily discernible to anyone looking at the Property. There was no evidence from, or about, any specific person involved with the Property explaining how disclosure might make them reluctant to assist bylaw enforcement officials. There was also no evidence about whose cooperation in particular was needed or whose reluctance could reasonably be expected to harm the bylaw enforcement matter.

[32] Islands Trust also argues that disclosing the records may reveal the steps it has taken in the bylaw enforcement matter and allow the applicant to infer what other steps it may take. CT says disclosure to the applicant could limit the enforcement options available to the Islands Trust. However, it is not apparent why, if the applicant acquired such knowledge, it could reasonably be expected to harm the bylaw enforcement matter or limit Island Trust's enforcement options.[30] Islands Trust's submission and evidence do not explain, and there is also nothing in the records that sheds light on, or corroborates, what Islands Trust says about the anticipated harm.

[33] I agree with former Commissioner Loukidelis' statement about the type of evidence that is required in order to establish s. 15(1) applies. He said:

> As I have said many times before, the evidence required to establish that a harms-based exception like those in ss. 15(1)(a) and (l) must be detailed and convincing enough to establish specific circumstances for the contemplated harm that could reasonably be expected to result from disclosure of the withheld records; it must establish a clear and direct connection between the disclosure of the withheld information and the alleged harm. General speculative or subjective evidence will not suffice.[31]

[34] In this case, Islands Trust has made assertions that are unsupported by cogent evidence or explanation. I find that is not enough to establish the required clear and direct connection between disclosure of the information in dispute and a reasonable expectation of harm under s.15(1)(a).

> *Section 15(1)(c) - harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement*

[35] Islands Trust is also refusing to disclose the Memorandum and the Notes under s. 15(1)(c).[32] Islands Trust's s. 15(1)(c) argument is similar to what it says

[30] As far as I can tell, the applicant is not under investigation by Islands Trust, nor is he mentioned in the records.
[31] Order F08-03, 2008 CanLII 13321 (BCIPC) at para. 27.
[32] F19-79920 pp. 1-3 and 56-58. There is some overlap in Islands Trust's arguments about ss. 15(1)(a) and (c), but because it addressed those provisions separately, I have done the same.

about s. 15(1)(a). It says disclosure of the records "prior to presentation to the Islands Trust may harm the enforcement options available to it."[33]

[36] Islands Trust also says that, if the records are released, the Property's residents are unlikely to assist Islands Trust in its investigation because they disclose "the layout, descriptions and photographs of the Property and the structures on it."[34] It says that this would not only harm the ongoing law enforcement matter, but it would also harm the effectiveness of investigative techniques and procedures currently used by the Islands Trust.

[37] The applicant says that the investigative techniques used here are inspections, photos and reports. He says those techniques are common knowledge and his knowing them will not harm their effectiveness.[35]

Findings, s. 15(1)(c)

[38] As I did with s. 15(1)(a), I find that Islands Trust's s. 15(1)(c) submissions consist of assertions that are unsupported by evidence linking the disclosure to a reasonable expectation of harm. Specifically, Islands Trust's submissions and evidence do not elaborate or go into any detail about what it says. For instance, it does not say what available enforcement options, investigative techniques and procedures it means, or how disclosing the records could possibly harm such matters. It is certainly not apparent from what is contained in the records.

[39] I conclude that Islands Trust has not established that disclosure of the information in dispute could reasonably be expected to cause harm under s. 15(1)(c).

Section 15(1)(l) – harm to security of any proper or system

[40] Islands Trust is also refusing access to the Memorandum, the Notes, and some of the Correspondence under s. 15(1)(l).[36] Islands Trust says that s. 15(1)(l) "applies to plans or layouts of structures in its files where the applicant is not the owner… the Records describe and include photographs of the layout of the Property and a number of structures, and the security of the Property could reasonably be expected to be harmed through the release of the Records."[37]

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[33] Islands Trust initial submission at para. 25 and CT's affidavit at para. 6.
[34] Islands Trust initial submission at paras. 24-26.
[35] Applicant's submission at p. 9.
[36] The Correspondence being withheld under s. 15(1)(l) is at pp. 6-13 of File F19-80293 Records. Islands Trust has applied only s. 15(1)(a) to the balance of the Correspondence. Islands Trust also applied s. 15(1)(l) to the photographs, but that is not at issue in this inquiry as the applicant said he did not want the photographs.
[37] Islands Trust initial submission at paras. 22-23.

[41] The applicant submits that it is absurd for Islands Trust to imply that he would constitute a threat to the safety, security of the Property, its residents or Islands Trust.[38]

[42] Islands Trust replies that it is not alleging that the applicant is or might be a threat to the Property or its residents. It says that it must proceed on the basis that disclosure to the applicant is disclosure to the world, and the risk of harm to the security of property arises because of what others could reasonably be expected to do with the information.[39]

Findings, s. 15(1)(l)

[43] Islands Trust does not explain, even in the broadest terms, what "others could reasonably be expected to do with the information." What Islands Trust means is not apparent from my review of its submissions and evidence and the records (including the photographs). The disputed information relates to the type of buildings one might expect to find on a hobby farm or residential property. What Islands Trust says fails to shed light on why disclosing this information might harm the security of the Property and its buildings.[40] I find that Islands Trust has not has not established that disclosing the information in dispute could reasonably be expected to cause harm under s. 15(1)(l) harm.

[44] In summary, Islands Trust has not established it is authorized to refuse to disclose the information in dispute under ss. 15(1)(a), (c) or (l).

Unreasonable invasion of a third party's personal privacy, s. 22

[45] Islands Trust is also refusing to disclose portions of the disputed information under s. 22.[41] Section 22 says that the head of a public body must refuse to disclose personal information to an applicant if the disclosure would be

[38] Applicant's submission at p. 11.
[39] Islands Trust's reply submission at para. 8.
[40] The information in dispute in this case is not at all like what previous orders have found may be withheld under s. 15(1)(l). For example: information that describes the architecture of the Ministry of Finances' computer system and how certain applications interface with one another (Order F11-14, 2011 BCIPC 19); information in BC Lottery Corporation's manual about security and surveillance in casinos, how and when cash and chips are moved, where they are stored and counted, and under what conditions (Order F11-12, 2011 BCIPC 15); TransLink's codes for communicating confidentially about emergencies and suicides (Order F21-09, 2021 BCIPC 13); and BC Pavilion Corporation's manual on how to construct, operate, and maintain BC Place Stadium's retractable roof (Order F18-13, 2018 BCIPC 16).
[41] Islands Trust highlighted the information it is withholding under s. 22. It is on the following pages: File F19-79920 Records at pp. 1, 2, 56, 57 and 58. File F19-80293 Records at pp. 1, 6, 8, 9, 10, 11, 12, 14, 16 and 17.

an unreasonable invasion of a third party's personal privacy.[42] I will follow the same analytical approach to s. 22 that previous orders have consistently used.[43]

Personal Information

[46] Section 22 only applies to personal information, so the first step in a s. 22 analysis is to determine if the information in dispute is personal information. Personal information is defined in FIPPA as "recorded information about an identifiable individual other than contact information." 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."[44]

[47] I find that some information in the Memorandum and Notes is personal information because it is about named individuals and it is not contact information. It is the names of the neighbour and a resident of the Property, who seems to have been acting as the neighbour's representative, as well as what they said to bylaw staff.[45] It is also the names of bylaw enforcement staff and what they did.

[48] I also find that most of the information in the Correspondence is personal information. Islands Trust only identified snippets of the Correspondence as being personal information, but I do not think that goes far enough.[46] The context and nature/format of the Correspondence is significant here. The Correspondence was sent to the neighbour (and neighbour's representative) in the context of a bylaw enforcement investigation into the neighbour's actions. The nature/format of these particular records, as well as what they actually say, evaluates the neighbour and his activity with respect to bylaw's requirements. That information is about the neighbour and I find it is his personal information.

[49] However, I find that Islands Trust has incorrectly withheld other information under s. 22 that is not personal information. For instance, much of the information in the Memorandum and Notes is exclusively about the Property and buildings so it is not personal information. There is also template-type information like document headers and footers, page numbers and dates that are

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[42] In relation to an access request under FIPPA, a third party is any person, group or persons or organization other than the person who made the request, or a public body. See Schedule 1 of FIPPA for the definition of "third party".

[43] See for example, Order 01-53, 2001 CanLII 21607 (BC IPC) at p. 7 and Order F15-52, 2015 BCIPC 55 (CanLII) at para. 32.

[44] See Schedule 1 of FIPPA for the definitions of personal information and contact information. There is no contact information in the records.

[45] Islands Trust's initial submission at para. 8.

[46] Given the mandatory nature of s. 22, I cannot ignore personal information just because the public body did not identify it as such.

not personal information. There are also several vague references to people which I find is not personal information. These people are referred to by generic terms only, and given the context, I am satisfied that they are not identifiable individuals.

[50] There is also information in the Correspondence that is not personal information because it is contact information for the bylaw staff, specifically their signature blocks.

[51] From this point forward, I will only consider the information that I have determined is personal information.

Not an unreasonable invasion, s. 22(4)

[52] The second step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4). If so, disclosure would not be an unreasonable invasion of a third party's personal privacy. The parties do not make submissions about s. 22(4).

[53] For the reasons that follow, I find that s. 22(4)(e) applies to the bylaw staff's personal information in the Memorandum and Notes.[47] Section 22(4)(e) says:

> 22 (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
> …
> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

[54] Previous orders have found that s. 22(4)(e) covers personal information that is about an individual's job duties in the ordinary course of work-related activities, namely objective factual information and statements about what the individual did or said in the normal course of discharging their job duties.[48] I make the same finding here about the bylaw staff's personal information. It is their job titles and factual statements about what they did in the normal course of their work duties.

[55] Because s. 22(4)(e) applies, disclosing the bylaw staff's personal information in the Memorandum and Notes would not be an unreasonable invasion of their personal privacy. Therefore, Islands Trust is not authorized to refuse to disclose that information to the applicant under s. 22(1), so I will not consider it any further.

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[47] Section 22(4) does not apply to any other personal information in the records.
[48] For example, Order 01-53, 2001 CanLII 21607 (BC IPC) at para 40 and Order F18-31, 2018 BCIPC 34 (CanLII) at para 77.

Presumptions, s. 22(3)

[56] The third step in the s. 22 analysis is to determine whether s. 22(3) applies to the personal information.[49] If so, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy.

[57] Islands Trust submits that s. 22(3)(b) applies. The applicant says that the information could be redacted without disclosing information protected by a s. 22(3) presumption.[50]

[58] For the following reasons I agree that s. 22(3)(b) applies to some of the personal information. Section 22(3)(b) says:

> 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,

[59] Previous orders have consistently said that s. 22(3)(b) can apply to personal information gathered during bylaw investigations.[51] I agree and have applied that same approach here. The context and content of the records clearly show that the personal information was gathered and compiled by bylaw enforcement staff during an investigation into the neighbour's alleged contravention of the land use bylaw. I am satisfied that all of the personal information was compiled and is identifiable as part of an investigation into the possible violation of law, so s. 22(3)(b) applies.

[60] I find no other presumptions in s. 22(3) apply to the personal information.

Relevant circumstances, s. 22(2)

[61] The final step in the s. 22 analysis is to consider the impact of disclosure of the personal information in light of all relevant circumstances, including those listed in s. 22(2). It is at this step that the s. 22(3)(b) presumption may be rebutted.

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[49] In relation to an access request under FIPPA, a "third party" is any person, group of persons or organization other than the person who made the request or a public body. See Schedule 2 of FIPPA for definitions.

[50] Applicant's submission at p. 15.

[51] For example: Order F07-02, 2007 CanLII (BC IPC) at para. 58; Order 01-12, 2001 CanLII 21566 (BC IPC) at para. 17; Order F17-01, 2017 BCIPC 1 (CanLII) at para. 63; Order F14-38, 2014 BCIPC 41 (CanLII) at para, 25; Order F16-03, 2016 BCIPC 2 (CanLII) at para.34; Order F18-10, 2018 BCIPC 12 (CanLII) at para. 19; F18-31, 2018 BCIPC 34 at para. 79.

[62] The parties' submissions mention ss. 22(2)(a), (b), (c) and (g). In addition to considering those circumstances, I will also consider the nature of the information and the applicant's existing knowledge of the disputed personal information.

[63] Islands Trust says:

> None of the relevant circumstances favour disclosure of this personal information. Disclosure of this third party personal information is not desirable or necessary to subject the Islands Trust's activities to public scrutiny (section 22(2)(a)). Disclosure of this personal information is not likely to promote public health or safety (section 22(2)(b)). The personal information is not relevant to a fair determination of the applicant's rights (section 22(2)(c)). There are no other relevant circumstances that support the conclusion that disclosure would not unreasonably invade third party personal privacy.[52]

[64] CT says she has concerns about the Correspondence being disclosed "due to the descriptions and photographs depicting the layout of the Property, particularly if there are individuals residing there."[53] She does not elaborate or explain her concerns.

[65] The applicant says that Islands Trust should have taken ss. 22(2)(a), (c) and (g) into account.[54]

[66] Section 22(2)(a) - Section 22(2)(a) states that a relevant circumstance to consider is whether disclosure of the personal information is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny.

[67] The applicant asserts that public scrutiny of the records is needed because Islands Trust has not taken timely or adequate action to deal with the alleged bylaw infractions on the Property. He says, "20 years of the offence continuing and worsening despite by-law support being sought, and a slew of rationalizations that for the most part claim or strongly suggest that I must be patient and it will happen, would seem to merit some 'public scrutiny'."[55]

[68] I am not persuaded by the applicant's argument that disclosing the personal information in this case is desirable for the purpose of subjecting Islands Trust's activities to public scrutiny. The disputed information does not discuss or shed any light on Islands Trust's past action and why it did or did not take steps to enforce the bylaw.

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[52] Islands Trust's initial submission at para. 16.
[53] CT's affidavit at para. 10.
[54] Applicant's submission at p. 16.
[55] Applicant's submission at p. 15.

[69] Section 22(2)(b) - Section 22(2)(b) requires considering whether disclosure of the personal information would likely promote public health and safety or promote the protection of the environment. Islands Trust's submission mentions s. 22(2)(b) as something it considered and found did not apply. I agree. The personal information in the records is not about public health, safety or the environment, so disclosure would not promote such matters.

[70] Section 22(2)(c) – Section 22(2)(c) is about whether the personal information is relevant to a fair determination of the applicant's rights. Previous orders have said that the following four criteria must be met in order for s. 22(2)(c) to apply: [56]

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;

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;

3. the personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and

4. the personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.

[71] Although the applicant raised s. 22(2)(c), he did not explain how it applies. I can see nothing in the records to suggest that this is a relevant circumstance that weighs in favour of disclosure.

[72] Section 22(2)(g) – This circumstance requires considering whether the personal information is likely to be inaccurate or unreliable. The applicant says that Islands Trust should have taken s. 22(2)(g) into account, but he does not elaborate. There is nothing that I can see to indicate that the accuracy or reliability of the third parties' personal information is an issue. Therefore, I am not persuaded by what the applicant says that s. 22(2)(g) is a relevant circumstance that weighs in favour of disclosing the personal information to him.

[73] Nature of the information – The nature of the personal information in the Memorandum and the Notes is innocuous and not about intimate or sensitive matters. It is factual detail about the Property, like the names the occupants use to refer to the Property's various buildings. None of this is about third parties' feelings or opinions about what is going on. I find that the innocuous, non-sensitive nature of that information weighs in favour of its disclosure.

[56] For example, see: Order 01-07, 2001 CanLII, 21561 (BC IPC) at para. 31 or Order F20-37, 2020 BCIPC 43 (CanLII) at paras. 113-117.

[74] However, the personal information in the Correspondence is different. The Correspondence is information that evaluates and casts judgment on the neighbour's activity regarding his compliance with the land use bylaw. For that reason, I find that this personal information is sensitive and that circumstance weighs against its disclosure.

[75] The applicant's existing knowledge - Previous orders have said the fact that an applicant already knows the personal information can be a relevant circumstance that may weigh in favour of disclosure.[57]

[76] The applicant's evidence is that he has seen the Property's structures on many occasions as they are visible from his own property and the surrounding roads. He also says that he and his wife know the majority of the people who reside on the Property and they have socialized in each others' houses over the years.[58] The applicant also provides details of his communications with Islands Trust and they indicate Islands Trust told him there was a bylaw enforcement investigation underway and they gave him updates. It also shows that they told him bylaw violation warning notices were being issued.[59] Islands Trust does not refute the things the applicant says about what he already knows.

[77] I accept the applicant's evidence and find that he has existing knowledge of the much of the personal information, such as the neighbour's name, the Property's address and zoning designation. I also accept his evidence that Islands Trust has already disclosed to him the fact that an investigation is underway and that bylaw violation warning notices were issued. However, I am not persuaded that the applicant knows the specifics of what the neighbour, the neighbour's representative and bylaw staff communicated to each other, which is recorded in the Notes and the Correspondence.

[78] Where I find that the applicant already knows information, that circumstance weighs in favour of disclosure.

Conclusion, s. 22(1)

[79] While there is a significant amount of person information in the records,[60] some of the information in dispute is not personal information because it is contact information or it is not about identifiable individuals. Section 22 does not apply to information that is not personal information.

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[57] See, for example, Order F17-02, 2017 BCIPC 2 at para. 32 or Order F20-26, 2020 BCIPC 31 (CanLII) at para. 31 and the cases cited there.
[58] Applicant's submission at pp. 4-5.
[59] Applicant's Appendix 1.
[60] None of it is the applicant's personal information.

[80] Some of the personal information is about the bylaw officers' positions and functions as employees of the public body, so s. 22(4)(e) applies. Disclosing that information would not be an unreasonable invasion of anyone's personal privacy.

[81] I find that the rest of the personal information was compiled and is identifiable as part of an investigation into the possible violation of law. For that reason s. 22(3)(b) applies and disclosure is presumed to be an unreasonable invasion of third parties' personal privacy.

[82] Having considered the relevant circumstances as a whole, I find that the s. 22(3)(b) presumption has not been rebutted for the personal information that reveals what the neighbour, the resident and bylaw staff communicated to each other about the neighbour's bylaw compliance. It is sensitive information as it allows one to infer how the neighbour's bylaw compliance is being judged, and there is no indication that the applicant already knows those details. Disclosing that personal information would be an unreasonable invasion of the neighbour's personal privacy under s. 22(1).

[83] However, I find that disclosing the rest of the personal information would not be contrary to s. 22(1). Given its context in the Memorandum and Notes, it reveals factual information about the Property and buildings. That information is innocuous and not at all sensitive and, in some instances, I am also satisfied the applicant knows it already.

CONCLUSION

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

1. Islands Trust is not authorized by ss. 15(1)(a), (c) and (l) to refuse the applicant access to the disputed information.

2. I confirm, in part, Islands Trust's decision to refuse to disclose the disputed information under s. 22(1). I have highlighted the information that Islands Trust is required to refuse to disclose under s. 22(1) in a copy of the records provided to Islands Trust with this order.

3. Islands Trust is required to disclose to the applicant the information that is not highlighted as described in item 2 above.

4. Islands Trust is required to concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records it provides to the applicant in compliance with this order.

[85] Pursuant to s. 59(1) of FIPPA, Islands Trust is required to comply with this order by October 21, 2021.

September 7, 2021

ORIGINAL SIGNED BY

Elizabeth Barker, Director of Adjudication

OIPC File No.: F19-79920 and F19-80293