



Order F21-60

VICTORIA POLICE DEPARTMENT

Jay Fedorak
Adjudicator

November 22, 2021

CanLII Cite: 2021 BCIPC 69

Quicklaw Cite: [2021] B.C.I.P.C.D. No. 69

Summary: An applicant requested from the Victoria Police Department (VicPD) records containing their personal information. VicPD released some of the information but withheld the rest under s. 13 (advice and recommendations) and s. 22 (unreasonable invasion of privacy). The adjudicator found that VicPD had correctly applied the exceptions to disclosure and confirmed its decision to withhold the information at issue.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 22(1), 22(2)(e), 22(2)(f), 22(3)(b), 22(3)(h).

INTRODUCTION

[1] An individual (applicant) made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Victoria Police Department (VicPD) for a series of categories of information about themselves and information from the Watch Desk on a particular date. VicPD provided access to the records but withheld some of the information on the grounds that it was in the custody of the Royal Canadian Mounted Police and subject to the federal *Access to Information Act*.¹ It withheld other information under s. 13 (advice and recommendations), s. 15 (harm to investigations), s. 16 (harm to intergovernmental relations) and s. 22 (unreasonable invasion of privacy).

[2] The applicant requested a review by the Office of the Information and Privacy Commissioner (OIPC) of VicPD's decision to withhold the information under ss. 13, 15, 16 and 22.

¹ VicPD response letter to the applicant 30 April 2019.

[3] VicPD reconsidered its decision several times and disclosed further information to the applicant, including all the information subject to ss. 15 and 16, and ceased to rely on those exceptions.

[4] Mediation by the OIPC did not resolve the outstanding matters and the applicant requested they proceed to an inquiry.

ISSUE

[5] The issues to be decided in this inquiry are:

1. Whether s. 13(1) authorizes VicPD to withhold information; and
2. Whether s. 22(1) of FIPPA requires VicPD to withhold information.

[6] Under s. 57(1) of FIPPA, VicPD has the burden of proving that s. 13(1) applies to the information withheld. Under s. 57(2) of FIPPA, the applicant has the burden of proving that disclosure of the information in dispute would not be an unreasonable invasion of third-party personal privacy under s. 22(1) of FIPPA.²

DISCUSSION

[7] **Background** – The applicant has been charged with numerous offences and been involved in multiple altercations with police. They³ have made allegations of assault against multiple police officers. They took unsuccessful court action against one police officer.

[8] **Information at Issue** – The information in dispute is contained in two records. The first is a patrol staff sergeant's log for the nightshift on a particular night. It contains reference to actions the previous evening by the applicant at a police officer's residence. This is the only reference to the applicant in that document. It also summarizes curfew checks and calls of interest for that night involving third parties. The VicPD has withheld information about the various third parties under s. 22(1).

[9] The second record is an email chain containing communications between a police officer and a third party about the applicant. VicPD has withheld information identifying the third party under s. 22(1) and it has withheld recommendations that VicPD staff would be making to management at upcoming meetings on human resources issues.

² However, the public body has the initial burden to show that the information it is withholding under s. 22(1) is personal information: Order 03-41, 2003 BCIPC 49220 (CanLII) at paras. 9-11.

³ I am using a gender neutral pronoun as the gender of the applicant is not relevant.

Section 13 – advice and recommendations

[10] VicPD is withholding parts of three sentences under s. 13(1). The portions of s. 13 that are relevant in this case state:

13 (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

(2) The head of a public body must not refuse to disclose under subsection (1)

(g) a final report or final audit on the performance or efficiency of a public body or on any of its policies or its programs or activities, ...

(m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or

[11] The courts have described the purpose of protecting advice and recommendations from disclosure as to ensure public servants are able to provide full, free and frank advice, because some degree of deliberative secrecy can increase the effectiveness of the decision-making process.⁴ The term “advice” includes expert opinions on matters of fact on which a public body must make a decision for future action.⁵ The courts have also found it includes policy options prepared in the course of the decision-making process.⁶ Previous orders have upheld the application of s. 13(1) both when information reveals advice or recommendations and when it would enable a reader to draw accurate inferences about advice or recommendations.⁷

[12] Order F21-16 sets out the process for determining if s. 13(1) applies:

The s. 13 analysis involves two steps. First, I must determine if disclosure of the information in dispute would reveal advice or recommendations developed by or for the public body. If it would, then I must determine whether the information falls into any of the categories listed in ss. 13(2) or 13(3). If it does, the public body cannot refuse to disclose it. Section 13(2) lists categories of information that public bodies cannot withhold under s. 13(1).⁸

⁴ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [College of Physicians], para. 105; *John Doe v. Ontario (Finance)*, 2014 SCC 36 [John Doe], paras. 34, 43, 46, 47.

⁵ *College of Physicians*, para. 113.

⁶ *John Doe*, para. 35.

⁷ See, for example, Order F15-60, 2015 BCIPC 64 (CanLII), para. 12. See also Order F16-32, 2016 BCIPC 35 (CanLII). Order F15-52, 2015 BCIPC 55 (CanLII), also discusses the scope and purpose of s. 13(1).

⁸ Order F21-16, 2021 BCIPC 21 (CanLII), paras. 14 and 15.

[13] In arriving at my decision on s. 13(1), I have considered the principles for applying s. 13(1) set out in the court decisions and orders cited above.

[14] VicPD submits that it has applied s. 13(1) to portions of discussions of advice or recommendations and disclosure would reveal that advice. It notes that this information does not fall within any of the exclusions under s. 13(2).⁹ The applicant makes no submission with reference to s. 13 specifically. He merely states that he wishes to have access to the information.

Analysis

[15] The information at issue consists of parts of three sentences all relating to recommendations that VicPD staff would be making to management at an upcoming meeting. From my reading of the text, these are clearly recommendations in the context of s. 13(1). I agree with VicPD that none of the provisions of s. 13(2) apply.

[16] Therefore, for the reasons above, I find that s. 13(1) applies to the information about the recommendations from staff to management. I confirm the decision of VicPD to apply s. 13(1).

Section 22 – harm to third-party personal privacy

[17] The proper approach to the application of s. 22(1) of FIPPA has been the subject of analysis in previous BC orders. A clear and concise description of this approach is available in Order F15-03, where the adjudicator stated the following:

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.¹⁰

[18] I have taken the same approach in considering the application of s. 22(1) here.

Step 1: Is the information “personal information”?

[19] Under FIPPA, “personal information” is recorded information about an identifiable individual, other than contact information. “Contact information” is

⁹ VicPD’s initial submission, para. 68.

¹⁰ Order F15-03, 2015 BCIPC 3 (CanLII), at para. 58.

“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.”¹¹

[20] The information at issue includes third parties’ names and other identifying information.¹² I find that the information at issue is the third parties’ personal information for the purposes of s. 22(1).

Step 2: Does s. 22(4) apply?

[21] Neither party makes submissions as to the applicability of any of the provisions in s. 22(4) in this case. None of them appear to me to apply. Therefore, I find that none of the information falls within s. 22(4).

Step 3. Does s. 22(3) apply?

[22] The relevant provisions read as follows:

22 (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party’s personal privacy if

(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,

...

(h) the disclosure could reasonably be expected to reveal the content of a personal recommendation or evaluation, a character reference or a personnel evaluation supplied by the third party in confidence and the applicant could reasonably be expected to know the identity of the third party.

[23] **Section 22(3)(b)** – VicPD submits that all the personal information in the patrol staff sergeant’s log was compiled as part of police investigations into possible violations of law in accordance with s. 22(3)(b). VicPD asserts that this information is contained in police reports and is clearly about police investigations into possible violations of law.¹³

[24] I find that s. 22(3)(b) applies and that disclosure of the information at issue would be presumed to be an unreasonable invasion of the third parties’ personal privacy.

¹¹ FIPPA provides definitions of key terms in Schedule 1.

¹² FIPPA defines a third party as any person, group of persons or organization other than the person who made the request or a public body. See Schedule 1.

¹³ VicPD’s initial submission, paras. 31-32.

[25] **Section 22(3)(h)** – VicPD also raises the application of s. 22(3)(h) with respect to the email chain. It asserts that the comments the third party expressed about the applicant consist of a personal evaluation. Having reviewed the personal information at issue, I disagree. It is not the type of information that previous orders have found to be personal evaluations.¹⁴ This provision applies to formal evaluations, such as job or academic references and annual employment performance reviews, where one person with knowledge and expertise is evaluating the performance or suitability of another for an opportunity or promotion and the person providing the evaluations wants their identity to remain anonymous. It could also apply in the case of a tenancy reference from a landlord. The purpose of this provision is to enable the person providing the evaluation to speak freely without concern for possible repercussions to their existing relationship with the person who is the subject of the evaluation, which could occur if their identity was disclosed. It does not apply in cases where an individual is merely expressing an opinion or concerns about the behaviour of another, which is the nature of the information at issue in this case.

[26] Therefore, I find that s. 22(3)(h) does not apply to the personal information in the email chain.

Step 4: Do the relevant circumstances in s. 22(2) rebut the presumption of invasion of privacy?

[27] The relevant provisions are these:

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

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

[28] **Section 22(2)(e) financial or other harm** – VicPD submits that the third party who provided the information contained in the email chain would be subject to stress and mental harm. I am constrained in what I may say on this issue as VicPD provided part of its submission on this issue properly *in camera*, and I must avoid disclosing any information that might identify the third party. I can say that there is sufficient evidence before me to conclude that there is a reasonable prospect that disclosure of the information at issue would cause significant harm to the well being of the third party.

¹⁴ Order F17-46, 2017 BCIPC 51 (CanLII); Order 01-07, 2001 BCIPC 21561 (CanLII), para. 2; Order F16-01, 2016 BCIPC 1 (CanLII), para.10.

[29] Therefore, I find that s. 22(2)(e) is a relevant circumstance in this case arguing in favour of withholding the personal information.

[30] **Section 22(2)(f) supplied in confidence** – VicPD asserts that the third parties concerned provided their personal information in confidence. The third party at issue in the email chain states specifically in a passage in an email to the VicPD that they were submitting their personal information in confidence.¹⁵ With respect to the personal information in the staff sergeant's log, VicPD submits that it is reasonable to assume that individuals have expectations of privacy when they provide their personal information to police as part of an investigation. It cites Order F15-30, in which the adjudicator held that there generally will be a reasonable expectation of confidentiality with respect to personal information in police reports.¹⁶

[31] I have reviewed the emails in question, and I am satisfied that this information was supplied in confidence. I find that s. 22(2)(f) is a relevant factor in this case.

[32] **Other relevant circumstances** – The parties do not argue the application of any other relevant circumstances in this case, and I find that none apply here.

Conclusion on s. 22(1)

[33] I found above that the information in dispute constitutes third parties' personal information. I have found that none of the provisions in s. 22(4) apply that would have excluded the application of s. 22(1).

[34] I find that some of the personal information constitutes information provided as part of investigations into possible violations of law, in accordance with s. 22(3)(b), and disclosure is presumed to be an unreasonable invasion of third-party personal privacy.

[35] I find that none of the relevant factors in s. 22(2) apply to rebut the presumption that disclosure would be an unreasonable invasion of privacy.

[36] I find that the third parties provided their personal information in confidence in accordance with s. 22(2)(f). This circumstance argues in favour of withholding the information.

¹⁵ VicPD's initial submission, para. 51.

¹⁶ VicPD's initial submission, para. 24; Order F15-30, 2015 BCIPC 33 (CanLII).

[37] I also find that the applicant did not make a case that disclosure of this personal information would not be an unreasonable invasion of privacy of the third parties.

[38] In conclusion, I find that s. 22(1) applies to the personal information at issue and VicPD must withhold it.

CONCLUSION

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

1. Under s. 58(2)(b), I confirm the decision of VicPD to withhold information under s. 13(1).
2. Under s. 58(2)(c), I require VicPD to refuse access, under s. 22(1), to the personal information it withheld under s. 22(1).

November 22, 2021

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

OIPC File No.: F19-79405