



Order F23-03

VANCOUVER ISLAND HEALTH AUTHORITY

Jay Fedorak
Adjudicator

January 20, 2023

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Summary: An employee made two requests under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Vancouver Island Health Authority (VIHA). One was for a report of an investigation into a respectful workplace complaint and associated records. The other was for her personal information relating to job competitions. VIHA withheld some of the information under s. 13(1) (advice and recommendations) and 22(1) (unreasonable invasion of personal privacy of a third party). The adjudicator found that VIHA had correctly applied s. 13(1) to some of the information. The adjudicator ordered VIHA to disclose the rest of the information to which it applied s. 13(1). The adjudicator confirmed VIHA's decision to apply s. 22(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, s. 13(1), 13(2), 13(3), 22(1), 22(2)(f), 22(3)(b), 22(3)(d), 22(3)(g), 22(3)(h)(i), 22(3)(h)(ii).

INTRODUCTION

[1] An employee (applicant) made two requests under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Vancouver Island Health Authority (VIHA). The first request was for a report of an investigation into a respectful workplace complaint, which the applicant had filed, and related records. The second was for copies of her personal information related to job competitions to which she had applied. VIHA responded to these requests by disclosing records but withholding some information under s. 13(1) (advice and recommendations), 15(1) (disclosure harmful to law enforcement) and 22(1) (unreasonable invasion of personal privacy of a third party). VIHA also withheld some information under s. 3(h) on the grounds that the records were outside the scope of FIPPA because they constituted a question or answers to be used on an examination or test.

[2] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the responses of VIHA. During the course of mediation, VIHA disclosed some information and ceased to rely on ss. 3(h) and 15(1).

[3] Mediation was unsuccessful in resolving the remaining issues and the applicant requested the matter proceed to an inquiry.

ISSUES

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

1. Whether s. 13(1) authorizes VIHA to refuse to disclose information; and
2. Whether s. 22(1) requires VIHA to refuse to disclose information.

[5] With respect to the application of s. 13(1), s. 57(1) stipulates that the public body has the burden to prove that the applicant has no right of access to the information. With respect to the application of s. 22(1), s. 57(2) stipulates that the applicant has the burden to prove that disclosure would not be an unreasonable invasion of the personal privacy of a third party.¹

DISCUSSION

[6] **Background** – The applicant is an employee of VIHA with many years of service. Over the years, she has differed with VIHA management and the human resources department concerning her position and the applications she made to job competitions. She has filed several formal complaints regarding these issues.

[7] **Records at issue** – The records consist of reports, notes, emails, letters and resumes regarding job competitions and a respectful workplace complaint investigation. These records comprise a total of 742 pages, 117 of which include information in dispute. Some of the pages, including those where VIHA withheld information, consist of duplicates.

[8] **Information at issue** – VIHA has withheld the information about third parties, including resumes and information regarding their participation in job competitions. It has also withheld information collected as part of a workplace complaint investigation. Other information at issue relates to the personal lives of the correspondents, who are VIHA employees or contractors. In addition, VIHA has withheld information in notes and email correspondence relating to human resource management issues, which VIHA submits consists of advice and recommendations. VIHA has also withheld the banking information of some of its

¹ 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), paras. 9-11.

contractors, but the applicant has agreed to exclude this information from the scope of the inquiry.

Section 13(1) – advice or recommendations

[9] Section 13(1) allows a public body to refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister. The relevant provision reads as follows:

- 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)
- (a) any factual material,
- ...
- (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

[10] Judicial reviews and decisions of the British Columbia Court of Appeal, as well as Order F22-56 have described the proper approach to the application of s. 13(1).²

[11] The courts have interpreted the term “advice” as being broader than just the offering of recommendations as to a particular course of action. The Court of Appeal found that “advice” includes “an opinion that involves exercising judgment and skill to weigh the significance of matters of fact” and “expert opinion on matters of fact on which a public body must make a decision for future action”.³ The Court of Appeal also stated, “the deliberative process includes the investigation and gathering of the facts and information necessary to the consideration of specific or alternative courses of action”.⁴ It observed that “some degree of deliberative secrecy fosters the decision-making process, by keeping investigations and deliberations focussed on the substantive issues, free of disruption from extensive and routine inquiries.” In the case before the court, “The confidentiality claimed by the College has a similar objective: to allow it to thoroughly investigate a complaint with the open and frank assistance of those experts who have the knowledge and expertise to help in assessing a complaint and deciding how to proceed.”⁵

² See for example, F22-56, 2022 BCIPC 63 (CanLII); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025.

³ *College of Physicians*, para. 113.

⁴ *College of Physicians*, para. 106.

⁵ *College of Physicians*, para. 105.

[12] Therefore, for s. 13(1) to apply there must have been a deliberative process, which could include an investigation, where one or more advisors have provided recommendations or advice, including expert opinions on matters of fact. It is important to note, however, that s. 13(1) applies only to the advice and recommendations provided by the advisor. It does not apply to a general description of the subject matter to which the advice or recommendations relates unless that description reveals the actual advice or recommendations that the advisor offered. Nor does it apply to the wording of requests for advice and recommendations unless the wording of the request reveals the actual advice or recommendations provided.

[13] Section 13(1) will also apply when disclosure of the information would enable an individual to draw accurate inferences about any advice or recommendations.

[14] The first step in the analysis is to determine whether disclosing the information at issue would reveal advice or recommendations under s. 13(1). If it would, the next step is to decide whether the information falls into any of the provisions in s. 13(2) or whether it has been in existence for more than 10 years in accordance with s. 13(3). If ss. 13(2) or 13(3) apply to any of the information, it cannot be withheld under s. 13(1).

[15] VIHA submits that the information that it has withheld under s. 13(1) consists of advice and recommendations regarding proposed courses of action relating to workplace matters and the applicant's complaints and concerns, including the following:

- (a) human resource allocations;
- (b) the conduct of various job competitions;
- (c) the terms of employment offers;
- (d) the means of and processes for addressing the applicant's concerns and complaints, including related to investigations, litigation, and dispute resolution; and
- (e) career development.⁶

[16] VIHA submits that it is apparent from the face of the records that the investigators conducting the respectful workplace investigations gathered information to issue findings and recommendations to VIHA. The investigations also involved the VIHA personnel requesting and providing advice with respect to matters of process. In addition, VIHA states that managing the various job competitions and other human resource matters at issue included VIHA personnel and employees of a contractor, PFM Executive Search, requesting

⁶ VIHA's initial submission, para. 22.

and providing recommendations relating to the conduct of those matters.⁷

[17] VIHA submits further that any factual information that it has withheld is integral to the advice or recommendations to which it relates. It argues as follows:

Island Health submits that any facts that have been severed were used by the parties to the relevant communications for the purposes of providing explanations necessary for the consideration of the advice or recommendations, as the case may be, and reflect an integral component of such advice or recommendations

[18] Therefore, VIHA argues, s. 13(2)(a) does not apply to this information.⁸ VIHA also notes that none of the records are more than ten years old. Consequently, it argues that s. 13(3) does not apply.

[19] The applicant neither accepts nor contests the application of s. 13(1). She states only that she is relying on me to determine whether VIHA has correctly applied this exception.⁹

Analysis and findings

[20] VIHA has correctly applied s. 13(1) to many of the passages that it has severed. These passages clearly consist of advice or recommendations that an official is providing for the consideration of another official as part of a deliberative process. In some cases, these passages also consist of expert opinions on matters of fact that inform the process of deciding a course of action.

[21] There are other passages, to which VIHA has applied s. 13(1), that do not reveal advice or recommendations. For s. 13 to apply, there must be a deliberative process for which someone is providing advice or recommendations. The following is severed information for which there is no evidence of anyone having to deliberate on anything (with page numbers in parentheses):

- An email in which an official, who is making decisions about the matter under discussion, informs another official of the course of action that the first official proposes to take and invites comment. The passage does not enable anyone to infer what advice or recommendations, if any, were provided. (136).
- An email in which an official speculates as to what might happen in the future, or what was happening at the time, without any connection to a decision having to be made about it. (139).

⁷ VIHA's initial submission, para. 18.

⁸ VIHA's initial submission, para. 21.

⁹ Applicant's response submission, p. 5.

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- Emails in which one official asks another official for advice on a certain subject, but the passage does not enable anyone to infer what the advice was that the second official subsequently provided, if any. (136, 165-166).
 - Emails in which one official informs another that they are trying to obtain some information before proceeding with a course of action. (139, 165-166).
 - An email string in which one official was seeking to find out whether something particular had happened and another official was seeking to find out whether something had concluded. There is also a request for factual information that an official provided. There is no apparent deliberation involved in this correspondence. (147-149).
 - An email in which an official offers unsolicited observations that do not appear to have any bearing on any deliberations. (160).
 - An email in which an official is communicating the results of a decision and the reasons for it, without revealing any advice that informed that decision. (181).
 - Notes of a telephone call including a passage stating an official expressed willingness to do something, but it is not clear whether there needs to be any deliberations or who would deliberate (183).
 - Notes of telephone conversations indicating what would happen and that a certain subject had been discussed (188).
 - Notes of a meeting including a passage stating the note taker made a prediction about the person that they were meeting with, which did not relate to a deliberation (205).
 - Notes of a meeting including a passage stating one of the participants indicated that they wanted something, and that the organization wanted something else (403).
 - Entries in an official's calendar indicating activities scheduled for particular days, where there is no indication that they relate to advice or recommendations (214).
 - An exchange of emails in which one official expresses concerns to a second official and the second official acknowledges those concerns. It is not clear that this communication relates to a deliberation, what that deliberation might concern or who would deliberate (545).
 - An email in which one official indicates that there is a decision that needs to be made, that they do not know the opinion of the organization and they would like to discuss it with another official. This passage does not provide any information that would enable a reader to infer any advice or recommendations. (670).
 - An email in which one official informs another official about some things that would be done. There is nothing to suggest that this has any bearing on advice or recommendations (708).

[22] Therefore, I find that, with the exception of the passages indicated immediately above, VIHA has correctly applied s. 13(1) to the information at issue.

[23] I have reviewed the information to which VIHA correctly applied s. 13(1) and can confirm that none of it consists of purely factual material in accordance with s. 13(2)(a). I also find that none of the other provisions in s. 13(2) apply. Therefore, I find that s. 13(2) does not apply to any of the information.

[24] Finally, it is clear from the face of the records that none of the information has been in existence for more than 10 years, so I find that s. 13(3) does not apply.

[25] In summary, I confirm the decision of VIHA to withhold some information under s. 13(1). I also find that VIHA incorrectly applied s. 13(1) to information on pages: 136, 139, 147-149, 160, 165, 166, 181, 183, 188, 205, 214, 403, 545, 670 and 708. For clarity, I have highlighted in yellow the information on those pages that VIHA is not authorized to refuse to disclose under s. 13(1).

Section 22(1) – unreasonable invasion of third-party privacy

[26] The proper approach to the application of s. 22(1) of FIPPA is described 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

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

Step 1: Is the information “personal information”?

[28] Under FIPPA, “personal information” is recorded information about an identifiable individual, other than contact information. “Contact information” is “information to enable an individual at a place of business to be contacted and

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

includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.”¹¹

[29] VIHA submits that the information it has withheld under s. 22(1) consists of the personal information of individuals other than the applicant. This information includes the resumes of other candidates, the evaluation and assessment of all candidates, and personal information that investigators compiled as part of workplace investigations.¹²

[30] The applicant does not contest VIHA’s assertion that this information constitutes personal information.

[31] I can confirm that the information to which VIHA has applied s. 22(1) constitutes recorded information about an identifiable individual other than contact information. Therefore, I find that it meets the definition of personal information.

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

[32] VIHA submits that s. 22(4) does not apply to any of the personal information at issue. The applicant does not contest this point.

[33] There is no evidence before me that any of the provisions of s. 22(4) apply in this case. Therefore, I find that none of the information falls within s. 22(4).

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

[34] 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, ...
 - (d) the personal information relates to employment, occupational or educational history,
 - ...
 - (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,
 - (h) the disclosure would reveal
 - (i) the identity of a third party who supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation, or

¹¹ FIPPA provides definitions of key terms in Schedule 1.

¹² VIHA’s initial submission, para. 32.

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

[35] **Section 22(3)(b) investigation into a violation of law** – VIHA submits that this provision applies to the personal information that an investigator compiled as part of their investigation into workplace complaints and cites previous orders that it submits supports its interpretation.¹³ The applicant does not contest this point.

[36] I note that both of the orders VIHA cited concern possible violations of the *Workers Compensation Act*¹⁴, which is not relevant in this case. Section 22(3)(b) applies to information that was compiled and is identifiable as part of an investigation into a possible violation of law. Past orders define “law” as including a legislative provision the violation of which could result in a penalty or sanction.¹⁵

[37] VIHA has not identified a particular statute or bylaw at issue in this case. Therefore, I find that s. 22(3)(b) does not apply.

[38] **Section 22(3)(d) educational and employment history** – VIHA submits that previous orders have found that personal information collected as part of an employment interview process constitutes the educational and employment history of the individual candidates. VIHA asserts that it is clear on the face of the records that the resumes and interview information about the candidates consists of their educational and employment history.¹⁶

[39] VIHA also submits that other orders have found that information about a third party’s behaviour or actions compiled as part of a workplace investigation also constitute the employment history of the third party. It asserts that some of the personal information in one of the investigation reports and in the communications relating to the workplace investigations includes the employment history of individual employees.¹⁷

¹³ VIHA’s initial submission, para. 38; Order F10-36, 2010 BCIPC 54 (CanLII), para. 20; Order 01-02, 2001 BCIPC 21566 (CanLII), para. 17.

¹⁴ RSBC 2019, c. 1.

¹⁵ Order 01-12, 2001 BCIPC 21566 (CanLII), para. 17; Order F22-31, 2022 BCIPC 34 (CanLII), paras. 53.

¹⁶ VIHA’s initial submission, paras. 39 and 41; Order F22-38, 2022 BCIPC 43 (CanLII), para. 54; and Order F22-22, 2022 BCIPC 24 (CanLII), para. 31; Order F16-28, 2016 BCIPC 30 (CanLII); Order F15-29, 2015 BCIPC 32 (CanLII) and Order 00-48, 2000 BCIPC 48 (CanLII).

¹⁷ VIHA’s initial submission, paras. 40 and 42; Order F22-38, para. 54; Order F22-10, 2022 BCIPC 10 (CanLII), para. 96; Order F20-13, 2020 BCIPC 15 (CanLII), para. 52; Order 01-53, 2001 CanLII 21607, at paras. 32-33.

[40] The applicant does not contest these points.

[41] Past orders have found that personal information, such as resumes, interview scores and job competition results, are their employment history. They have found that employment history also includes statements by witnesses, a complaint about an individual's workplace behaviour or an investigator's findings, because it relates to the employment history of the person being investigated.¹⁸

[42] I can confirm that the records include personal information of candidates in employment applications and interviews as well as personal information of employees compiled as part of workplace investigations, including complaints, witness statements and findings. This information consists of the types of information that the previous orders noted above found to be educational and employment history. I find that this information constitutes the educational and employment history of third parties in accordance with s. 22(3)(d) and disclosure is presumed to be an unreasonable invasion of privacy.

[43] **Section 22(3)(g) personal evaluations** – VIHA submits that previous orders found that, as part of an employment competition process, the notes of assessors of the qualifications and performance of the candidates constitute personal evaluations for the purposes of s. 22(3)(g). It argues the same applies to an investigator's assessment of the behaviour of third parties in the context of a workplace investigation. VIHA asserts that it is apparent from the face of the records that they contain assessments of candidates and employees in the context of employment competition processes and workplace investigations. The applicant does not contest these points.¹⁹

[44] I have reviewed the records and can confirm they contain passages including assessments of candidates and employees in the contexts of employment competition processes and workplace investigations. I find that s. 22(3)(g) applies to this information and that disclosure is presumed to be an unreasonable invasion of privacy of the third parties.

[45] Nevertheless, I find that VIHA has mistakenly applied this section to evaluations of the applicant. As s. 23(3)(g) applies only to evaluations of third parties, and the applicant is not a third party, this section cannot apply to evaluations of the applicant.

[46] **Section 22(3)(h) identity of third party who supplied an evaluation** – VIHA submits that the records concerning workplace investigations include

¹⁸ Order F22-38, *supra*, paras. 55 and 58; Order F16-28, *supra*, para. 94

¹⁹ VIHA's initial submission, paras. 43-45; Order F22-38, *supra*, paras. 57-58; Order 16-12, 2016 BCIPC 14 (CanLII), para. 28; Order F14-10, 2014 BCIPC 12 (CanLII), para. 19; Order F05-30, 2005 BCIPC 32547 (CanLII) paras. 41-42; and Order 01-07, 2001 BCIPC 21561 (CanLII), para. 21.

evaluations of the applicant by third parties. It asserts that it cannot disclose this information without revealing the identities of those third parties.²⁰ The applicant does not contest these points.

[47] I have reviewed the passages at issue and can confirm that they include evaluations of the applicant by third parties and that disclosing those evaluations would reveal the identities of those third parties. This is because these passages are included in correspondence which identifies the third parties or there is other contextual information that would enable the applicant to infer their identities. Therefore, I find that s. 22(3)(h)(i) and (ii) apply to this information and disclosure is presumed to be an unreasonable invasion of privacy.

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

[48] The relevant provision reads 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

...

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

[49] **Section 22(2)(f) supplied in confidence** – VIHA submits that some of the information at issue was supplied in confidence. It identifies the personal information of third parties submitted as part of their applications for employment and the evaluations of those applications by the assessors. It also cites personal information collected as part of workplace investigations as having been supplied in confidence. VIHA submits an affidavit from its Manager of Information Stewardship, Access and Privacy who attests that it is the practice of VIHA to treat this type of information as supplied in confidence.²¹

[50] The applicant does not contest this point.

[51] I have reviewed the records at issue and can confirm that some of the information includes personal information of third parties submitted as part of employment applications and workplace investigations. I accept that the third parties supplied this information in confidence because it is VIHA's practice to receive this information as supplied in confidence. I also consider that a reasonable person would conclude that individuals would want these types of information to remain confidential. Therefore, I find that s. 22(2)(f) is a relevant circumstance favouring the withholding of the personal information.

²⁰ VIHA's initial submission, para. 48.

²¹ VIHA's initial submission, para. 51; Affidavit 1, para. 19.

[52] **Sensitivity of the personal information** VIHA submits that the general sensitivity of the personal information at issue is another relevant consideration. The applicant does not contest this point.

[53] I find that the sensitivity of some of the personal information at issue is a relevant circumstance favouring withholding of the information. The information relates to workplace investigations where disclosure of allegations and assessments about individuals may affect their reputations.

[54] **Other relevant considerations** – VIHA submits that there are no relevant circumstances in this case favouring the disclosure of the personal information. The applicant does not identify any other relevant circumstances. From my review of the records, I do not see any other relevant circumstances that may apply.

Conclusion on s. 22(1)

[55] I found above that all the information in dispute is 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).

[56] I find that some of the personal information constitutes the educational and employment history of third parties, in accordance with s. 22(3)(d), and its disclosure is presumed to be an unreasonable invasion of third-party personal privacy.

[57] I find that s. 22(3)(g) applies to the evaluations of third parties by employment competition assessors and workplace complaint investigators.

[58] I also find that other information constitutes personal evaluations of the applicant that third parties have supplied in confidence, and that disclosure of the personal evaluations would reveal their identities. This is presumed to be an unreasonable invasion of third-party personal privacy under s. 22(3)(h).

[59] I find that there are no relevant factors in s. 22(2) that rebut the presumptions that disclosure would be an unreasonable invasion of third-party personal privacy. On the other hand, I find that the third parties provided, in confidence, their personal information at issue, in accordance with s. 22(2)(f), and that favours withholding the information. I also find that the sensitivity of some of the personal information is a relevant consideration that favours withholding the information.

[60] In summary, I find that there are relevant circumstances that support withholding the information and none that support disclosing it. Therefore, the

relevant circumstances in this case do not rebut the presumption that disclosure would be an unreasonable invasion of privacy.

[61] I also find that the applicant did not make a case that disclosure of this third-party personal information would not be an unreasonable invasion of the privacy of the third parties. The burden of proof lies with the applicant on this issue, and she has not met her burden of proof.

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

CONCLUSION

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

1. Subject to item 2 below I confirm in part the decision of VIHA to withhold information under s. 13(1).
2. VIHA is not authorized under s. 13(1) to withhold the information I have highlighted on pages 136, 139, 147-149, 160, 165, 166, 181, 183, 188, 205, 214, 403, 545, 670 and 708 in a copy of the records that will be provided to VIHA with this order.
3. VIHA must give the applicant access to the highlighted information described in item 2 above.
4. I require VIHA to refuse access, under s. 22(1), to the personal information it withheld under s. 22(1).
5. VIHA must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records/pages described at item 2 above.

[64] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by March 6, 2023.

January 20, 2023

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

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