



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F23-28

MINISTRY OF EDUCATION

Lisa Siew
Adjudicator

April 13, 2023

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Summary: An applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to a report about the board of education for School District No. 33. The Ministry of Education (Ministry) provided the applicant with partial access to the report, but withheld some information under s. 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA. The adjudicator determined the Ministry correctly applied s. 22(1) to some of the information withheld in the report. However, the adjudicator found the Ministry was not required to withhold other information under s. 22(1) and ordered the Ministry to give the applicant access to that information.

Statute Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, Schedule 1 (definitions of an “educational body”, “local public body”, “public body”, “third party”), ss. 22(1), 22(2)(a), 22(2)(f), 22(3)(d), 22(3)(g) and 22(4)(e). *School Act*, RSBC 1996, c 412, Section 1 (definitions of “board” and “trustee”), ss. 49, 65 and 171.1.

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant requested the Ministry of Education (Ministry) provide access to a report (Report) about the board of education (Board) for School District No. 33.

[2] In response, the Ministry withheld the entire Report under ss. 13 (advice and recommendations) and 22 (unreasonable invasion of third-party personal privacy) of FIPPA. The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the Ministry’s decision. The OIPC’s investigation and mediation process did not resolve the dispute between the parties. The applicant requested the matter proceed to this inquiry.

[3] During the inquiry, the Ministry withdrew its application of s. 13(1) and disclosed some information to the applicant that it previously withheld. Therefore, I conclude that information and s. 13(1) are no longer at issue in this inquiry.

ISSUE AND BURDEN OF PROOF

[4] The issue I must decide in this inquiry is whether the Ministry is required to withhold the information at issue under s. 22(1).

[5] Section 57(2) of FIPPA places the burden on the applicant to establish that disclosure of the information at issue would not unreasonably invade a third-party's personal privacy under s. 22(1). However, the public body has the initial burden of proving the information at issue is personal information.¹

DISCUSSION

Background

[6] The applicant's children attend School District No. 33, which is governed by the Board.²

[7] In 2020, the Minister of Education (Minister) publicly appointed a two-person special advisory committee (Committee) to inspect and evaluate the Board on a number of matters. The Minister publicly stated that the review was required to ensure the decision-making of all trustees at the Board support student achievement and wellness and that all trustees were adhering to the Board's code of conduct.

[8] The appointment of the Committee was made pursuant to a ministerial order under s. 171.1 of the *School Act*.³ This provision gives the Minister the authority to appoint a special advisory committee to review an education board's progress on certain matters or as directed by the Minister. In the ministerial order, the Minister specified six matters to be reviewed by the Committee, including the Board's ability to work co-operatively to fulfill its duties.

[9] In early 2021, the Committee completed its review and provided the Report to the Minister. The Ministry then issued a news release about the review and its findings. As part of the news release, the Minister directed the Board to take several specific actions by a set date, including the review and revision of its policies to ensure the promotion of a safe, welcoming and inclusive school community for all students.

¹ Order 03-41, 2003 CanLII 49220 (BCIPC) at paras. 9–11.

² The information in this background section is compiled from the parties' submissions and evidence.

³ *School Act*, RSBC 1996, c. 412.

Record and information at issue

[10] The record at issue is the Committee's Report, which totals 27 pages including two appendices. The Ministry disclosed the entirety of the two appendices, one of which is a copy of the ministerial order. The Report has five parts: Introduction, Mandate, Process, Observations On Issues Identified By The Ministerial Order and Overall Observations.

[11] The information at issue is located on 21 pages of the Report. The Ministry withheld information in several sections of the Report, including most of the information that reveals the Committee's findings and observations about the Board.

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

[12] Section 22(1) of FIPPA requires a public body to refuse to disclose personal information the disclosure of which would unreasonably invade a third-party's personal privacy. Numerous OIPC orders have considered the application of s. 22(1) and I will apply the same approach in this inquiry.

A dispute about the s. 22(1) evidence

[13] In support of its decision to withhold the information at issue under s. 22(1), the Ministry provided an affidavit from a senior legislative analyst (Analyst). In their affidavit, the Analyst comments on the information withheld in the Report. For instance, the Analyst says the information withheld under s. 22(1) is "very personal and sensitive in nature."⁴

[14] The applicant submits I should reject this affidavit evidence because the Analyst did not explicitly say they read the Report or that they worked on or had access to the Report. The applicant says this omission is important because the Ministry is relying on the affidavit to support its redactions when there is no indication the Analyst even reviewed the Report. The applicant argues most of the Analyst's comments can be attributed to publicly available information rather than direct knowledge. As a result, the applicant questions the reliability of the Ministry's affidavit evidence and submits it should not be accepted in support of the Ministry's s. 22(1) decision.

[15] In response, the Ministry says the Analyst reviewed the Report prior to affirming their affidavit and that, if necessary, it can provide a further affidavit which attests to that fact. The Ministry also submits that it is clear from the Analyst's affidavit that they read the Report since the Analyst talks about information in the Report.⁵ The Ministry says the accuracy of the Analyst's

⁴ Affidavit of NH at para. 14.

⁵ Ministry's response submission at para. 5.

statements can be verified by reviewing the Report, which would show that the Analyst did in fact read the Report.

[16] Section 56(1) of FIPPA gives the Commissioner or their delegate the authority to decide all matters of fact and law arising in the course of an inquiry, which would include matters regarding the admissibility of evidence. Furthermore, as an administrative tribunal, the OIPC is generally not bound by the normal rules of evidence that govern judicial proceedings.⁶ The Commissioner or their delegate has the authority and discretion to admit evidence that they consider relevant or appropriate for the purposes of deciding the matters at issue in an inquiry, whether or not that evidence would be accepted in a court of law.⁷

[17] I agree with the applicant that the Analyst does not explicitly say that they reviewed the Report or explain the source of their knowledge about the Report such as whether it is based on information and belief from a specific person. However, having reviewed the Report and the Analyst's affidavit, I am satisfied the Analyst did read the Report prior to affirming their affidavit. As noted by the Ministry, I find the Analyst refers to certain information in the Report that they could only know by reviewing the Report.⁸

[18] I also find there is no unfairness to the applicant in admitting this evidence. The applicant was given notice and an opportunity to comment on the affidavit evidence and contradict it. Therefore, I have accepted the Analyst's affidavit into evidence for this inquiry and I will consider it along with the rest of the Ministry's arguments and evidence. The weight that I give to this evidence in terms of its reliability and relevance is a separate matter which is incorporated into my analysis and findings regarding s. 22.

Personal information

[19] Section 22 applies only to personal information; therefore, the first step in the s. 22 analysis is to determine if the information at issue is personal information.

[20] "Personal information" is defined in FIPPA as "recorded information about an identifiable individual other than contact information."⁹ Information is about an identifiable individual when it is reasonably capable of identifying a particular individual, either alone or when combined with other available sources of information.

⁶ *Cambie Hotel (Nanaimo) Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2006 BCCA 119 at paras. 28-36.

⁷ *British Columbia Lottery Corporation v. Skelton*, 2013 BCSC 12 (CanLII) at para. 64.

⁸ Affidavit of NH at paras. 13 and 15.

⁹ Schedule 1 of FIPPA.

[21] “Contact information” is defined in 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.”¹⁰

[22] The Ministry submits the information at issue is the personal information of several third parties “regarding an employment-related investigation.”¹¹ It also says “it is very common in the Report that the withheld personal information is about more than one individual and therefore jointly personal information of numerous individuals.”¹² However, the Ministry says the Report does not contain the applicant’s personal information.

[23] Without the benefit of reviewing the Report, the applicant submits they are unable to verify what the Ministry says about the information at issue. The applicant accepts that it is unlikely that any of their personal information is in the Report, but says they cannot confirm whether that is the case.

Information that is personal information

[24] I find some of the information withheld under s. 22(1) is about several identifiable individuals, including elected trustees who are members of the Board and school district staff and officials. This information includes their names, a description of their actions and behaviour, what others have said about them or their comments and opinions about others. Some of the withheld information is also the Committee members’ observations about the trustees and other identifiable individuals. I am satisfied that none of the withheld information about these individuals is contact information as defined under FIPPA and interpreted by past orders. As a result, I conclude the information about these individuals is personal information.

[25] Some of the information withheld in the Report references or discusses the Board as a whole and its activities. Under the *School Act*, the Board is a corporation.¹³ Normally, corporations and organizations do not have personal privacy rights under s. 22(1) of FIPPA.¹⁴ However, for the reasons that follow, I am satisfied this information about the Board would be about several identifiable individuals rather than the activities of a corporation.

[26] In Order F19-19, a senior adjudicator determined that references to the activities of a larger group, specifically a ministry, in certain investigation reports qualified as personal information under s. 22. The senior adjudicator concluded it

¹⁰ Schedule 1 of FIPPA.

¹¹ Ministry’s initial submission at para. 35.

¹² *Ibid* at para. 35.

¹³ Section 65 of the *School Act*, RSBC 1996, c 412.

¹⁴ Order F17-39, 2017 BCIPC 43 at para. 75.

was reasonable to expect that someone could determine that the term “ministry” in the investigation reports referred to the actions and behaviour of certain identifiable individuals because of the widely known nature of the investigations, the relatively small group of people whose activities and decisions were under investigation and considering the specific information at issue.¹⁵

[27] I find those same factors and considerations are relevant and applicable here. It is not in dispute that the review leading to the Report, the terms of the review and the Report’s overall conclusions are publicly known. As previously noted, the Ministry issued press releases about that information. Furthermore, the ministerial order that sets out the terms of the review is publicly available. The ministerial order directs the Committee to consider several matters that focus on the Board’s activities and the actions of the elected trustees. Therefore, I find the purpose and focus of the review is widely known or available to the public.

[28] As well, the Board is made up of a small number of individuals whose identities are known or easy to determine. The Ministry acknowledges that the individuals involved in the matters addressed in the Report are widely known because those matters have received considerable attention from the media and the public and resulted in numerous published stories.¹⁶ The applicant also says that it is publicly known that the review relates to the conduct, jointly and individually, of the seven elected trustees who make up the Board.¹⁷ Therefore, I find there was a relatively small group of identifiable people whose actions and decisions were under review.

[29] Turning now to the information at issue, I find information about the Board in the Report is situated or described in such a way that it is about identifiable individuals considering the public nature of the review and the small number of identifiable Board members. Where the Report refers to the Board and its activities, I am satisfied that it would be possible to determine that this information is either about all seven trustees who make up the Board or a subset of those trustees. As a result, I find the references to the Board and its activities in the Report are personal information.

[30] Taking that into account, I can see that some of the withheld information reveals what people interviewed by the Committee said about the Board, the trustees and other identifiable individuals.¹⁸ Considering my finding above, I find this information would qualify as the personal information of the individuals identified in the comments, including the trustees since it is someone else’s

¹⁵ 2019 BCIPC 21 (CanLII) at para. 38.

¹⁶ Ministry’s initial submission at para. 17.

¹⁷ Applicant’s submission at para. 53.

¹⁸ Information located on pp. 4, 15 and 20 of the Report.

opinion or comments about all or some of them. The question then is whether this information is also the personal information of the opinion-giver.

[31] An individual's opinions and comments are their personal information only to the extent there is information that reveals or identifies that individual as the opinion-holder.¹⁹ In this case, the Ministry disclosed information in the Report which shows the Committee "assured interviewees that comments would not be attributed to individuals."²⁰ I find this is an accurate statement. When summarizing what the interviewees have said about the Board, the trustees or other people, I can see that the Committee was careful not to associate any of those comments with a particular individual. Therefore, I find this information is not the personal information of the opinion-holders since they are not identifiable from the opinions and comments or from other information in the Report. As a result, I conclude this information is the personal information only of the individuals identified in the comments and opinions.

Information that is not personal information

[32] I find the Ministry withheld information in the Report that is not reasonably capable of identifying a *particular* individual, either alone or when combined with other available sources of information. This withheld information refers to certain organizations or groups of people where, in my view, it is not possible to identify a particular individual from that information or the other available information in the Report.²¹ As well, the Ministry withheld information in the Report that generally refers to boards of education and elected trustees with none of this information mentioning the specific Board here and its trustees or another individual.²² There is no argument or evidence to explain how any of this information is about identifiable individuals for the purposes of s. 22.

[33] Some of the information withheld in the Report is a description or summary of the comments, views and opinions of a group.²³ No specific names or other identifying information is associated with that information. Past OIPC orders have found that aggregate comments, views or opinions of or about groups of people are not personal information because the people in question are not identifiable.²⁴ I agree with that conclusion and find the information here is of the same kind. The comments and opinions are associated with the collective views of a larger group rather than linked to a specific individual. Those comments and opinions are also not about an identifiable individual. Therefore, I conclude this information is not personal information under FIPPA.

¹⁹ Order F17-01, 2017 BCIPC 1 (CanLII) at para. 48.

²⁰ Information disclosed on p. 2 of the Report under the heading "Process".

²¹ Information located on pp. 2 and 18 of the Report.

²² Information located on pp. 5 and 19 of the Report.

²³ Information located on pp. 18, 20 of the Report.

²⁴ Order F05-30, 2005 CanLII 32547 at para. 36. Order F17-51, 2017 BCIPC 56 at para. 14.

[34] The Ministry also withheld a small amount of information in the Report that is clearly not about a person, but refers to an object or thing.²⁵ This information is written in such a way that it does not identify, nor is it associated with, a particular individual. Therefore, I conclude this information is not personal information under FIPPA.

Section 22(4) – disclosure not an unreasonable invasion

[35] The second step in the s. 22 analysis is to determine if the personal information falls into any of the types of information or circumstances listed in s. 22(4). If it does, then the disclosure of the personal information is not an unreasonable invasion of a third party's personal privacy and the information cannot be withheld under s. 22(1).

[36] Section 22(4)(e) is relevant for this inquiry. This provision states the disclosure of personal information about a third party's position, functions or remuneration as an officer, employee or member of a public body is not an unreasonable invasion of the third party's personal privacy.

[37] The Ministry submits s. 22(4)(e) does not apply in this case because the Report "clearly relates to a workplace investigation as it is a report by special advisors to the Minister specifically about their investigation."²⁶ The Ministry argues past OIPC orders have found that s. 22(4)(e) does not apply to information arising from a workplace investigation into employee behaviour or a workplace conflict.²⁷ The Ministry says the information withheld in the Report is the "recorded information of third parties regarding an employment-related investigation."²⁸

[38] The applicant disagrees and says the Report is about the elected trustees' position and functions as members of a public body. The applicant distinguishes the present circumstances from the orders cited by the Ministry on the basis the information at issue here is not about an employee matter and that it is publicly known the Report relates to the individual and joint conduct of the seven elected trustees who are the members of the Board.

[39] For s. 22(4)(e) to apply in this case, the Board must be a public body under FIPPA and the withheld information must be about a third party's position, functions or remuneration as an officer, employee or member of the Board. Therefore, the first question I must address is whether the Board is a public body under FIPPA. Under schedule 1 of FIPPA, the term "public body" is defined to

²⁵ Information located on p. 17 of the Report.

²⁶ Ministry's initial submission at para. 37.

²⁷ Ministry's initial submission at para. 37, citing Order F20-13, 2020 BCIPC 15 (CanLII) at para. 48 and Order F08-04, 2008 CanLII 1322 at para. 24. Ministry's response submission at para. 13.

²⁸ Ministry's initial submission at para. 35.

include a “local public body” which then includes “an educational body.” The term “educational body” is defined to include “a board as defined in the *School Act*.” The *School Act* defines a “board” as “a board of school trustees constituted under this Act or a former Act.”²⁹ It is not in dispute that the Board in this case is a properly constituted board of school trustees. Therefore, I conclude the Board is a public body under FIPPA.

[40] The next question is whether the information withheld under s. 22(1) is about a third party who is an officer, employee or member of the Board. Some of the information withheld in the Report is about the individual trustees of the Board. Schedule 1 of FIPPA defines a “third party” as any person, group of persons or organization other than the person who made the access request or a public body. The individual trustees are clearly not the applicant in this case, nor are they a public body under FIPPA since the Board as a whole qualifies as a public body rather than the individual trustees themselves. Therefore, I am satisfied the individual trustees qualify as third parties under FIPPA. I also find the trustees are clearly members of the Board. The *School Act* defines a “trustee” to mean “a member of a board.”³⁰ Therefore, I conclude the individual trustees identified in the Report qualify as members of a public body for the purposes of s. 22(4)(e).

[41] The remaining question is whether the withheld information is about an individual trustee’s position, functions or remuneration as a Board member. Previous OIPC orders have found that s. 22(4)(e) applies to information that reveals a public body employee’s name, job title, duties, functions, remuneration (including salary and benefits) or position.³¹ Section 22(4)(e) has also been found to apply to information that relates to a public body employee’s job duties in the normal course of work-related activities, namely objective, factual information about what the individual did or said in the course of discharging their job duties.³²

[42] However, whether s. 22(4)(e) applies in a particular case depends on the context in which the information at issue appears. For example, a previous OIPC order found that s. 22(4)(e) did not apply to a third-party employee’s name and title because it appeared in the context of a workplace investigation and would reveal personal information about the third party such as disciplinary action and severance information.³³ I agree with that approach. Where the information at issue appears in a context that reveals more than just the third party’s name, job title, duties, functions, remuneration, position or what they did in the normal

²⁹ Section 1 of *School Act*, RSBC 1996, c 412.

³⁰ *Ibid.*

³¹ For example, Order F20-54, 2020 BCIPC 63 (CanLII) at para. 56 and footnote 45.

³² Order 01-53, 2001 CanLII 21607 at para. 40. Order F18-38, 2018 BCIPC 41 (CanLII) at para. 70.

³³ Order F10-21, 2010 BCIPC 32 (CanLII) at para. 24.

course of their work or activities as a public body officer, employee or member, then s. 22(4)(e) does not apply.

[43] Some of the information withheld in the Report reveals several trustees' names, functions and activities as Board members.³⁴ However, given the context in which this information appears, I find its disclosure would reveal more than just the fact that those individuals were public body members and their normal Board-related functions and activities. The withheld information discusses the actions of individual board members in relation to the conflict and controversy that has plagued the Board over the years. I am, therefore, satisfied that disclosing this information would reveal additional information about the named individuals. As a result, I conclude s. 22(4)(e) does not apply to that information.

Section 22(3) – disclosure presumed to be an unreasonable invasion

[44] The third step in the s. 22 analysis is to determine whether any of the presumptions set out in s. 22(3) apply. Section 22(3) creates a rebuttable presumption that the disclosure of personal information of certain kinds or in certain circumstances would be an unreasonable invasion of third-party personal privacy. The Ministry submits the presumptions under ss. 22(3)(d) and 22(3)(g) apply. I will consider both of these presumptions below.

Employment history - s. 22(3)(d)

[45] Section 22(3)(d) creates a rebuttable presumption against disclosure where the personal information relates to the employment, occupational or educational history of a third party.

[46] The Ministry submits the information withheld in the Report is employment history because that information relates to issues involving the trustees of the Board and a workplace investigation. Citing previous OIPC orders, the Ministry says s. 22(3)(d) applies to information and allegations of wrongdoing in the workplace and an investigator's observations or findings about an employee's workplace behaviour or actions.³⁵ Therefore, the Ministry submits s. 22(3)(d) applies because the information withheld in the Report is "the personal information of third parties that is created in the context of a workplace investigation" and includes the special advisors' observations and findings about that workplace investigation.³⁶

³⁴ For example, information located on pp. 6-15 of the Report.

³⁵ Ministry's initial submission at paras. 41-43, citing Order F20-13, 2020 BCIPC 15 (CanLII) at paras. 52-54, Order F15-11, 2015 BCIPC 11 (CanLII) at para. 21 and Order F21-08, 2021 BCIPC 12 (CanLII) at para. 132.

³⁶ Ministry's initial submission at paras. 44 and 47.

[47] The applicant submits the individual trustees who make up the Board cannot be employees because none of the common elements associated with an employment relationship apply to the trustees. For instance, the applicant says the trustees have no set hours of work and are not entitled to overtime, vacation or severance pay. The applicant also says the trustees are not paid or hired under an employment contract and can only be removed from office under certain conditions set out in the *School Act*, none of which includes termination.

[48] In response, the Ministry says “the exact nature of the employment of the trustees of the Board is not of particular importance as far as the [FIPPA] analysis for this inquiry.”³⁷ It says, “even if it is the case that the trustees are not technically ‘employees’ of the Board (which the Ministry is not in a position to address), the individual trustees are still very clearly third parties as defined in Schedule 1 of [FIPPA].”³⁸ Therefore, the Ministry submits it can and must apply s. 22(1) to protect the privacy of those individuals. It also argues previous OIPC orders have found s. 22(3)(d) applies to workplace investigations involving school trustees.³⁹

[49] Section 22(3)(d) applies to personal information that relates to a third party’s employment history. As previously discussed, the trustees in this case qualify as third parties under FIPPA. However, the Ministry has not sufficiently explained how the trustees are employees or how the information at issue qualifies as their employment history for the purposes of s. 22(3)(d). Under s. 22(3)(d), the focus is on whether the personal information at issue relates to a third party’s employment history and not whether the information relates to a workplace investigation, as argued by the Ministry. The fact that the information withheld under s. 22(1) may relate to an investigation or a review does not mean s. 22(3)(d) automatically applies. It will depend on the personal information at issue, the parties involved and the facts of each case.

[50] Furthermore, in all the previous OIPC orders cited by the Ministry, it was clear that the personal information being considered under s. 22(3)(d) was about a public body employee, which is not the case here. I agree with the applicant that all the earmarks of an employment relationship are not present here. Trustees are elected into public office and are not hired under, or subject to, an employment contract. There is also nothing in the *School Act* to indicate the trustees are employees. Instead, the *School Act* identifies the trustees as members of the Board who generally serve a term of office.⁴⁰ Therefore, without more, I am not persuaded the individual trustees identified in the Report qualify as employees and that the information at issue is their employment history under

³⁷ Ministry’s reply submission at para. 9.

³⁸ *Ibid.*

³⁹ *Ibid* at paras. 11-12, citing Order F19-35, 2019 BCIPC 39 (CanLII).

⁴⁰ Sections 1 and 49 of the *School Act*, RSBC 1996, c 412.

s. 22(3)(d), as argued by the Ministry. As a result, I conclude s. 22(3)(d) does not apply to any of the information withheld in the Report.

Personal evaluation - s. 22(3)(g)

[51] Section 22(3)(g) creates a rebuttable presumption that it is an unreasonable invasion of a third party's personal privacy to disclose personal information that consists of personal recommendations or evaluations, character references or personnel evaluations about a third party.

[52] The Ministry submits s. 22(3)(g) was previously found to apply to an investigator's evaluative comments about employees in the context of a formal workplace investigation.⁴¹ The Ministry argues the Committee was similarly tasked with evaluating, investigating, observing and inspecting certain matters related to the Board and its trustees. Therefore, the Ministry says s. 22(3)(g) applies in this case because some of the information withheld in the Report reveals the Committee's evaluative comments about the Board and its trustees which qualifies as a personal evaluation under s. 22(3)(g).

[53] The applicant did not address the Ministry's arguments about s. 22(3)(g).

[54] I can see that some of the information withheld in the Report is the Committee's evaluation of the Board and its trustees. In order for information to be considered a personal evaluation under s. 22(3)(g), as argued by the Ministry, there must be a formal assessment or evaluation of a third party's performance.⁴² I find the review done by the Committee is a formal evaluative process that was initiated and authorized through a ministerial order in accordance with the *School Act*.

[55] As previously discussed, I also find the individual trustees are third parties under FIPPA. Although the Board is a public body under FIPPA, I am satisfied that any references to the "Board" in the Report are about all or some of the trustees. Therefore, in this case, I find the Committee's evaluation of the Board and its trustees is about a third party. As a result, I conclude the presumption under s. 22(3)(g) applies to portions of the Report that reveals the Committee's evaluation of the Board and of the trustees' performance and behaviour.⁴³

[56] The parties did not identify any other s. 22(3) presumptions that may apply and I am satisfied there are no other s. 22(3) presumptions that are relevant in this case.

⁴¹ Ministry's initial submission at para. 49, citing Order F21-08, 2021 BCIPC 12 (CanLII) at para. 138.

⁴² Order 01-07, 2001 CanLII 21561 at paras. 21-22.

⁴³ For example, information located on pp. 5 and 20 of the Report.

Section 22(2) – relevant circumstances

[57] The final step in the s. 22 analysis is to consider the impact of disclosing the personal information at issue in light of all relevant circumstances. Section 22(2) requires a public body to consider the circumstances listed under ss. 22(2)(a) to (i) and any other relevant circumstances to determine whether disclosing the personal information at issue would be an unreasonable invasion of a third party's personal privacy. One or more of these circumstances may rebut the s. 22(3)(g) presumption that I found applies to some of the information withheld in the Report.

[58] The applicant submits s. 22(2)(a) weighs in favour of disclosure. The applicant also argues the Ministry's decision to withhold information in the Report is not consistent with past precedent, specifically an access request involving another school district and its board of education.⁴⁴

[59] The Ministry submits s. 22(2)(a) does not weigh in favour of disclosure, while s. 22(2)(f) favours withholding the information in the Report.

[60] I have also considered whether there are any other circumstances, including those listed under s. 22(2), that may apply. Based on my review of the withheld information, I find there is one other relevant circumstance to consider. Some of the information at issue is already known or easily inferable because of public statements made by the Ministry about the Report or from information already disclosed in the Report.

[61] I will consider all of the above-noted circumstances below. There were no other relevant circumstances for consideration.

Subjecting a public body's activities to public scrutiny – s. 22(2)(a)

[62] Section 22(2)(a) requires a public body to consider whether disclosing 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. Where disclosure would foster the accountability of a public body, this may be a relevant circumstance that weighs in favour of disclosing the information at issue.⁴⁵

[63] The applicant submits s. 22(2)(a) is a relevant circumstance in this case because school boards are "the primary conduit of public accountability to the implementation of the Ministry of Education's directives."⁴⁶ The applicant argues that it is important for the public to know if school boards are dysfunctional and, if

⁴⁴ The applicant did not specify, and I am unable to determine, whether the applicant made the access request in this other case.

⁴⁵ Order F05-18, 2005 CanLII 24734 at para. 49.

⁴⁶ Applicant's submission at para. 57.

so, the reasons for the dysfunction. The applicant says this information would assist the public in exercising their right to speak at board meetings and to engage in political advocacy during trustee elections by supporting trustees who are not causing the dysfunction. Therefore, the applicant submits “a report on the functioning of school boards, or lack of functioning, is of public interest to allow for public scrutiny.”⁴⁷

[64] The Ministry submits s. 22(2)(a) is not a circumstance that favours disclosure because none of the information withheld in the Report would subject its activities to public scrutiny. The Ministry says the information at issue would only subject several individual third parties to public scrutiny which is not the intent of s. 22(2)(a). The Ministry argues that it is not in the public interest to disclose information that is “part of a confidential investigation containing very sensitive personal information of numerous third parties.”⁴⁸ The Ministry says there has already been a certain level of public transparency about the existence of problems with the Board and that further disclosure would only be subjecting individuals to public scrutiny rather than a public body.

[65] One of the purposes of s. 22(2)(a) is to make public bodies more accountable.⁴⁹ Therefore, for s. 22(2)(a) to apply, the disclosure of the specific information at issue must be desirable for subjecting the public body’s activities to public scrutiny as opposed to subjecting an individual third party’s activities to public scrutiny.⁵⁰ For the reasons that follow, I find disclosing the information withheld in the Report is not desirable for subjecting the Ministry or another public body’s activities to public scrutiny.

[66] Normally, information about a board of education would be about a public body under FIPPA. However, given the circumstances leading up to and surrounding the Report and the content of the Report itself, I find most of the withheld information is really about the individual trustees and their behaviour and actions. Therefore, although the Board is a public body under FIPPA, I find most of the references to the “Board” in the Report is really about all or a few of the individual trustees who make up the Board. As a result, I am satisfied that the information withheld in the Report would only subject the collective and individual activities of the trustees to public scrutiny rather than a public body’s activities.

[67] I also find disclosing the information in the Report is not *desirable* for subjecting the Ministry or the Board’s activities to public scrutiny. The Ministry has already publicly shared the Report’s overall findings and conclusions about the Board’s governance practices and commitment to student safety and success. This public information identified concerns with, among other things, the

⁴⁷ *Ibid* at para. 60.

⁴⁸ Ministry’s initial submission at para. 54.

⁴⁹ Order F18-47, 2018 BCIPC 50 (CanLII) at para. 32.

⁵⁰ Order F16-14, 2016 BCIPC 16 (CanLII) at para. 40.

Board's ability to govern.⁵¹ It also noted that the Minister directed the Board to take specific actions by a set date.⁵²

[68] I find this information allows the public to scrutinize the Board's activities as a whole. One can easily determine from this public information that the Board is failing to meet its statutory duties and responsibilities. Therefore, I find the Ministry's current level of disclosure about the Board's activities in relation to the Report and the Committee's findings is sufficient for public scrutiny. In this case, I agree with the Ministry that any further disclosure of the information in the Report would be subjecting an individual's activities to public scrutiny rather than a public body's activities.

[69] For the reasons given, I conclude s. 22(2)(a) is not a circumstance that favours disclosing the information withheld in the Report.

Past precedent: another public body's response to an access request

[70] The applicant submits the Ministry's decision to withhold information in the Report is not consistent with past precedent. The applicant refers to an access request related to another school district and its board of education regarding issues of governance, absenteeism, interpersonal challenges and allegations of bullying, harassment and sexual harassment.⁵³ The applicant says the response package in that case disclosed information in a "briefing note to the Deputy Minister" and parts of a confidential report about "key findings, including 7 recommendations, and also a full manifest of interviews held with various individuals."⁵⁴ Therefore, the applicant argues the Ministry should have followed the same practice and disclosed more information or disclosed the entire Report.

[71] The Ministry submits that a different public body's response to another access request dealing with unrelated records is not relevant to the actual information in dispute in this inquiry and has no precedential value for this inquiry. It also says the applicant has not cited any past OIPC decisions that may be relevant.⁵⁵

[72] For the reasons that follow, I am not persuaded that another public body's decision to provide access in response to a different access request favours disclosing the information at issue in this inquiry. It is well-established that the analysis under s. 22 is a case-by-case determination which depends on the facts, the arguments and evidence provided by the parties, the information at issue and the particular circumstances. If the other access request was about the same

⁵¹ Affidavit of NH at para. 9.

⁵² *Ibid* at para. 10.

⁵³ Applicant's submission at para. 61.

⁵⁴ *Ibid* at paras. 62-63.

⁵⁵ Ministry's reply submission at para. 16.

information at issue here and there was evidence that the withheld information was already disclosed, then this may have been a relevant circumstance favouring disclosure.⁵⁶

[73] However, there is no evidence that the Report, which is at issue in this inquiry, was a responsive record in the other access request. While the overall subject matter of the other access request may be similar in that it involves conflict within a school district and its board of education, I find the information at issue, the surrounding circumstances and the parties involved are factually different. Therefore, I am not satisfied that another public body's response to a different access request is a factor that favours disclosure of the information withheld in the Report.

Supplied in confidence - 22(2)(f)

[74] Section 22(2)(f) requires a public body to consider whether the personal information was supplied in confidence. In order for s. 22(2)(f) to apply, there must be evidence that a third party supplied personal information to another and, at the time the information was provided, it was done so under an objectively reasonable expectation of confidentiality.⁵⁷

[75] The Ministry argues s. 22(2)(f) is a relevant circumstance which favours withholding the information at issue in the Report. The Ministry says it has not publicly released the Report, nor has it engaged in any public commentary about the Report except for its press releases.⁵⁸ It says the contents of the Report have been treated in a confidential manner and was only shared with "individuals whose roles necessitate knowing the contents."⁵⁹

[76] The Ministry submits treating the Report confidentially is "consistent with expectations across government."⁶⁰ It says "this confidentiality is critical to ensure individuals feel safe in coming forward with workplace issues and that these individuals can trust the Ministry with these highly sensitive, highly personal, employment-related matters."⁶¹

[77] The applicant did not address the Ministry's arguments about s. 22(2)(f).

[78] For s. 22(2)(f) to apply, the question in this case is whether any of the personal information in the Report was supplied in confidence by a third party. I find there is personal information withheld in the Report in the form of the

⁵⁶ Order F23-13, 2023 BCIPC 15 (CanLII) at para. 202.

⁵⁷ Order F11-05, 2011 BCIPC 5 (CanLII) at para. 41, citing and adopting the analysis in Order 01-36, 2001 CanLII 21590 (BC IPC) at paras. 23-26 regarding s. 21(1)(b).

⁵⁸ Affidavit of NH at para. 16.

⁵⁹ Ministry's initial submission at para. 55.

⁶⁰ *Ibid* at para. 56.

⁶¹ *Ibid*.

Committee's comments and observations about the Board, the trustees and other identifiable individuals. I find the Committee is a third party under FIPPA since it is not the person who made the access request or a public body.⁶²

[79] In terms of the confidential supply of this information, I find the information was supplied by a third party because the Committee is providing the Report to the Minister as required under the ministerial order. The Ministry also disclosed the heading "Cabinet Confidential" on the first page of the Report which suggests the Committee provided some of the personal information in the Report to the Minister on a confidential basis and with the understanding that it should only be disclosed to a specific audience. Therefore, I am satisfied some of the personal information in the Report provided by the Committee to the Minister was intended to be confidential.⁶³

[80] However, I do not find there was an intention of confidentiality for all of the personal information in the Report. The Minister publicly announced the existence and scope of the Committee's review, which suggests there was an intention to also publicly report back and comment about the results of the review. Therefore, I find it reasonable to conclude there was an expectation between the Committee and the Minister that some of the personal information in the Report would be publicly disclosed.

[81] Later, the Ministry did in fact issue a news release about the Committee's overall findings and conclusions. Some of the personal information withheld in the Report echoes those public statements and others made by the Ministry in its news release.⁶⁴ The public disclosure of this information does not support an expectation or understanding of confidentiality between the Committee and the Minister about this information. As a result, I am satisfied that some, but not all, of the personal information in the Report was supplied in confidence by the Committee for the purposes of s. 22(2)(f).

[82] Some of the personal information withheld in the Report consists of what people interviewed by the Committee think about the Board, the trustees and their actions or people providing information to the Committee about the Board and trustees.⁶⁵ I am satisfied that this information about the Board and the trustees would be personal information supplied by a third party. However, I find none of the individual third parties who provided this information to the Committee are identifiable. The Committee was careful to anonymize their identities and "assured interviewees that comments would not be attributed to individuals."⁶⁶

⁶² Definition of a "third party" under Schedule 1 of FIPPA.

⁶³ For example, information located on pp. 5 and 20 of the Report.

⁶⁴ For example, information withheld on pp. 1, 3, 5 of the Report.

⁶⁵ For example, information located on pp. 4, 15, 18, 19 and 20 of the Report.

⁶⁶ Information disclosed by the Ministry on p. 2 of the Report under the heading "Process".

[83] I find this assurance of anonymity speaks to the Committee's expectation that they would have to share what the interviewees said with others and that any privacy concerns would be addressed by the de-identification of those comments and opinions. There is also nothing in the Report itself which indicates the Committee told people before or during the interviews that any comments and opinions would not be shared with others. Therefore, I am not persuaded the interviewees provided their comments and opinions about the Board and the trustees to the Committee in confidence for the purposes of s. 22(2)(f). As a result, I find s. 22(2)(f) is not a circumstance that favours withholding this information.

Information already publicly known

[84] Previous OIPC orders have found a relevant circumstance that favours disclosure is when the personal information at issue is known to the public or has become common public knowledge.⁶⁷ In this case, I find some of the information withheld in the Report is known or easily inferable from public statements made by the Ministry or from information already disclosed in the Report.

[85] As previously mentioned, the Ministry issued a news release about the Committee's overall findings. As part of its news release, the Ministry noted the Committee "identified concerns with the board's ability to adhere to principles of good governance and ethical, civil and co-operative trustee behaviour, thereby, negatively impacting the board's ability to govern and the school district's ability to support student success."⁶⁸

[86] The Minister also said in the news release that, "elected trustees should model the conduct and approaches the school system expects to see in its students and its graduates, including respect for human rights, empathy for others, and rational and evidence-based decision-making."⁶⁹ The Minister then said that "based on the special advisors' findings," they were concerned "about the board's ability to fully support students and function effectively as a governing body."⁷⁰

[87] Furthermore, the news release also reports that the Minister directed the Board to take the following actions by a set date:

- Review and revise its policies and codes of conduct for students to ensure they promote a safe, welcoming and inclusive school environment;

⁶⁷ For example, Order 01-53, 2001 CanLII 21607 (BCIPC) at para. 77 and Order F16-52, 2016 BCIPC 58 (CanLII) at para. 83.

⁶⁸ Ministry's initial submission at para. 15.

⁶⁹ Affidavit of NH at Exhibit C.

⁷⁰ *Ibid.*

- Establish a plan for enhancing student achievement, with a focus on inclusive education, children and youth in care, and Indigenous students;
- Develop a policy regarding inclusive board practices after considering input from the school community;
- Review and revise its Code of Ethics for Trustees after obtaining and considering input from the school community;
- Work with the Office of the Human Rights Commissioner to arrange and participate in training; and
- Collaborate with local First Nations to develop policies and procedures that allow for meaningful engagement with Indigenous community members.⁷¹

[88] From the news release, I find it is clear that the Ministry has publicly communicated some of the Committee's findings in the Report. It is also easy to infer from these public comments that the Committee in its Report addressed and evaluated all or some of those issues and found the Board needed work in those areas.

[89] The news release also discloses some of the groups who were interviewed as part of the Committee's review. The Minister said they appreciated "the cooperation of everyone who participated in their investigation, including trustees, district staff, parents, teachers and other elected officials."⁷²

[90] Considering all of the above, it is not apparent why the Ministry is now refusing to provide the applicant with access to information that it previously had no concerns disclosing to the public. Therefore, I find the fact that the Ministry already publicly disclosed or referenced some of the information withheld under s. 22(1) favours disclosing this information where it appears in the Report.⁷³

[91] I also find the ministerial order which sets out the terms of the Committee's review refers to some of the conflict associated with the Board when it instructs the Committee to inspect and evaluate the following:

- a) The Board's ability to fulfill its duties and the ability of the Board's trustees to work together cooperatively in order to fulfill its duties;
- b) the Board's ability to establish and maintain a safe, welcoming and inclusive school community for all students and staff, regardless of

⁷¹ Ministry's initial submission at para. 16.

⁷² Affidavit of NH at Exhibit C.

⁷³ Information withheld on pp. 1, 2, 3, 5, 6, 15, 17, 18, 19 of the Report.

- characteristics including background, ability, sex, sexual orientation, or gender identity or expression;
- c) The extent to which the actions of trustees, in their role as trustees, are consistent with the human rights of students who are enrolled with the board;
 - d) The Board's relationship with members of the school community and partner groups;
 - e) The adherence of the Board's trustees to the Board's Policy 205 "Code of Ethics for Trustees";
 - f) Any effect of the matters set out in paragraphs (a), (b), (c), (d), and (e) on student achievement and performance in the schools operated by the Board.⁷⁴

[92] The Ministry also acknowledges that the individuals involved in the matters addressed in the Report are widely known because those matters have received considerable attention from the media and the public and resulted in numerous published stories.⁷⁵ Therefore, considering the public nature of the review and the publicity around the conflict associated with the Board, it is clear that the public expects the Report to evaluate the conduct of certain individuals and consider well-known incidents involving those individuals.

[93] The Ministry also disclosed information in the Report which shows that the Committee organized its observations and findings according to the six specific issues set out in the ministerial order. However, for reasons it does not explain, the Ministry withheld information in the Report that is clearly evident from this already disclosed information such as whom the Committee interviewed as part of its review and how the Committee chose to address two of the six issues.⁷⁶

[94] Taking all of this into account, I find the public nature of the review and the public's knowledge about the conflict and controversy surrounding the Board, as well as information already disclosed in the Report, favours disclosing some of the information withheld in the Report.

Conclusion on s. 22(1)

[95] I found some of the information withheld in the Report is not about a person or an identifiable individual.⁷⁷ As a result, I conclude the Ministry is not

⁷⁴ Ministry's initial submission at para. 11.

⁷⁵ *Ibid* at para. 17.

⁷⁶ Information located on pp. 2, 6 and 15 of the Report.

⁷⁷ Information located on pp. 2, 5, 17, 18, 19, 20 of the Report.

required to withhold this information under s. 22(1) since it is not “personal information” under FIPPA.

[96] For the information in the Report that is personal information, I find it would not unreasonably invade a third party’s personal privacy to disclose some information about the Committee’s findings and observations, who the Committee interviewed as part of the review, how it chose to address some issues in the Report, and some comments made by interviewees about the Board, the trustees and related matters.⁷⁸ I found this information was not supplied in confidence under s. 22(2)(f) and some of it is already publicly known or easy to determine from information disclosed in the Report.

[97] I did find some of this information is subject to the presumption under s. 22(3)(g) since it consists of the Committee’s personal evaluation of the Board and the trustees.⁷⁹ However, I find the presumption is rebutted because this information is known or easily inferable from public materials and statements made by the Ministry. For instance, one can easily determine from publicly available information that the Committee concluded in the Report that the Board and trustees failed to meet some of their duties and responsibilities. I am not satisfied that it would be an unreasonable invasion of a third party’s personal privacy to disclose information in the Report that only echoes or refers to information that the public already knows or can easily determine. As a result, I conclude the Ministry is not required to withhold this information under s. 22(1).

[98] However, I find it would be an unreasonable invasion of a third party’s personal privacy to disclose the rest of the information withheld in the Report. There were no circumstances that favoured the disclosure of this information to the applicant or to rebut the s. 22(3)(g) presumption that I found applied to some of the withheld information.

[99] In particular, there was no evidence that the information at issue here was previously disclosed in response to another access request. I also found the disclosure of this information was not desirable for subjecting the Ministry or another public body’s activities to public scrutiny under s. 22(2)(a). The disclosure of this information would subject only the activities of certain identifiable individuals to public scrutiny, which is not the intention of s. 22(2)(a).⁸⁰

[100] As well, I am satisfied that some of this information was supplied in confidence by the Committee to the Minister in accordance with s. 22(2)(f). Unlike other information in the Report, this information reveals the Committee’s detailed personal evaluation of the Board and the individual trustees which is not

⁷⁸ Information located on pp. 1, 2, 3, 5, 6, 15, 17, 18, 19, 20 and 21 of the Report.

⁷⁹ For example, information located on pp. 1 and 19 of the Report.

⁸⁰ For example, information located on pp. 7-16 of the Report.

publicly known or easy to determine.⁸¹ Therefore, I conclude the Ministry is required to withhold this information under s. 22(1).

CONCLUSION

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

1. Subject to item 2 below, I confirm the Ministry's decision to refuse access to the information withheld in the records under s. 22(1).
2. The Ministry is not required under s. 22(1) to withhold the information highlighted (in green) in a copy of the Report that will accompany this order.
3. I require the Ministry to give the applicant access to the information in the Report that it is not required to withhold. The Ministry must concurrently provide the OIPC registrar of inquiries with proof that it has complied with the terms of this order, along with a copy of the Report that it will provide to the applicant.

[102] Under s. 59 of FIPPA, the Ministry is required to give the applicant access to the information it is not required to withhold by May 26, 2023.

April 13, 2023

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

OIPC File No.: F21-86413

⁸¹ For example, information located on pp. 5 and 20 of the Report.