



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F23-36

CITY OF BURNABY

D. Hans Hwang
Adjudicator

May 18, 2023

CanLII Cite: 2023 BCIPC 43

Quicklaw Cite: [2023] B.C.I.P.C.D. No. 43

Summary: An applicant requested access under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to records about a workplace conduct investigation involving him. The City of Burnaby (City) provided the applicant with partial access to the records, but withheld some information under several exceptions to disclosure in FIPPA. The adjudicator determined that the City was authorized to refuse to disclose some, but not all, of the information it withheld under s. 13(1) (advice or recommendations) and all of the information it withheld under s. 14 (solicitor-client privilege). Finally, the adjudicator determined that the City was required to withhold some of the information under s. 22(1) (harm to personal privacy). The adjudicator ordered the City to provide the applicant with access to the information it was not required or authorized to refuse to disclose.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss. 13(1) 13(2), 13(3), 14, 22(1), 22(2)(f), 22(2)(g), 22(2)(h), 22(3)(g), 22(3)(h), 22(4).

INTRODUCTION

[1] An individual (applicant) asked the City of Burnaby (City) for access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records about the City's investigation into his workplace conduct.

[2] The City refused to disclose some information in the records to the applicant under ss. 13(1) (policy advice or recommendations), 14 (solicitor-client privilege), 15 (harm to law enforcement), 17 (harm to financial or economic interests) and 22(1) (harm to personal privacy) of FIPPA. The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the City's decision.

[3] OIPC's mediation did not resolve the matter and it proceeded to this inquiry.

[4] During the submission phase, the City confirmed that it is not relying on ss. 15 and 17, so those FIPPA exceptions are no longer issues in this inquiry.¹ The City's evidence includes pre-approved *in camera* materials (i.e., material that a party submits for the OIPC to see, but not the opposing party).²

ISSUES

[5] The issues I must decide in this inquiry are:

1. Is the City authorized to refuse to disclose information to the applicant under ss. 13(1) and 14?
2. Is the City required to refuse to disclose the information to the applicant under s. 22(1)?

[6] Section 57(1) of FIPPA states the City, who is a public body in this case, has the burden of proving that the applicant has no right of access to records or parts of records under ss. 13(1) and 14.

[7] Meanwhile, s. 57(2) places the burden on the applicant to prove disclosing 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.³

DISCUSSION

Background⁴

[8] The applicant worked as an employee of the City. Around March 2020, as a result of the COVID-19 pandemic, the City laid off many of its employees including the applicant. Then, the City and the City employee union negotiated the lay off and return to work terms for some of the employees who were laid off. The applicant resumed working one day a week.

[9] Around July 2020, the City received a complaint about workplace conduct involving the applicant and commenced an investigation. As a result of the findings of the investigation, the applicant was suspended.

¹ City's initial submission at para 9.

² OIPC's *in camera* decision dated November 10, 2022.

³ Order 03-41, 2003 CanLII 49220 (BCIPC) at paras 9–11.

⁴ The information in this background section is based City's initial submission at paras 11-13 and 17, and Affidavit #1 of the Director of Labour Relations at the City (Director) at paras 6-13.

Records and information at issue

[10] The City provided me with 140 pages of records. They are emails, letters and their attachments, draft versions of documents and City employees' notes. The City has partially severed some records and completely severed others.

Solicitor-client privilege, s. 14

[11] The City is withholding parts of a two-email chain under s. 14.⁵ There is a brief partially severed cover email that forwards a much longer completely severed email. The cover email is from the City's manager to two City directors.

[12] Section 14 states that a public body may refuse to disclose information that is subject to solicitor-client privilege. Solicitor-client privilege encompasses both legal advice privilege and litigation privilege.⁶ The City is claiming only legal advice privilege.⁷

[13] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice, opinion or analysis.⁸

[14] Legal advice privilege also applies to information that, if disclosed, would reveal or allow an accurate inference to be made about privileged information. For example, legal advice privilege extends to internal client communications that transmit or comment on privileged communications with lawyers.⁹

[15] The test for legal advice privilege has been expressed in various ways, but the essential elements are that there must be:

- a communication between solicitor and client (or their agent);
- that entails seeking or providing legal advice; and
- that is intended by the solicitor and client to be confidential.¹⁰

[16] Not every communication between a solicitor and their client is privileged; however, if the conditions above are satisfied, then legal advice privilege applies to the communications and the records relating to it.¹¹

⁵ Pages 111-112 of the records in dispute.

⁶ *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para 26.

⁷ City's submission at para 36.

⁸ *College*, *ibid* at para 31.

⁹ *Solosky v. The Queen*, [1980] 1 SCR 821 [*Solosky*] at p 834.

¹⁰ *Solosky* at p 837; *R. v. B.*, 1995 CanLII 2007 (BCSC) at para 22.

¹¹ See also *Solosky* at p 829.

Evidentiary basis for solicitor-client privilege

[17] The City did not provide the information it withheld under s. 14 for my review.

[18] Section 44(1) gives me the power to order production of records so I may review them during the inquiry. However, in order to minimally infringe on solicitor-client privilege, I would only order production of records being withheld under s. 14 when absolutely necessary to adjudicate the issues and not before first providing the public body with an opportunity to provide additional information to support its privilege claim. That approach is warranted due to the importance of solicitor-client privilege to the proper functioning of the legal system.¹²

[19] In this case, having considered the City's submissions and evidence, I determined that the evidence in the City's submissions was insufficient for me to make a decision about whether s. 14 properly applied, so I provided the City an opportunity to submit additional evidence.¹³ The City provided further submissions and an affidavit from a lawyer (Lawyer A).¹⁴

[20] After reviewing the City's further submissions and affidavit evidence, I determined that while the City did not provide the information withheld under s. 14, I have enough information to decide whether privilege applies. I find that Lawyer A's affidavit is acceptable evidence because it provides the date and a description of the contents of the forwarded email and the names and titles of individuals involved in the email. Based on this information, I am satisfied that I have sufficient detail to make an informed decision and it is not necessary to order production of the records.

Parties' submissions

[21] The City submits that it withheld the communications between the City and its legal counsel (Lawyer B).¹⁵ In support of its position, the City provides affidavits sworn by Lawyer A and the Director of Labour Relations at the City (Director).

[22] Lawyer A's affidavit deposes that:

¹² Order F19-14, 2019 BCIPC 16 (CanLII) at para. 10; *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para. 17; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII) at para. 68.

¹³ OIPC's letter dated March 13, 2023

¹⁴ The City's further submission and Lawyer A's affidavit are dated April 6, 2023. The applicant responded to that further material and the City provided a reply.

¹⁵ City's initial submission at para 36.

- The information in the forwarded email references a ‘legal memorandum’.
- The forwarded email is from the City’s manager to Lawyer B, who is the City’s legal counsel, and copied to another of its legal counsel (Lawyer C) and the same two directors who received the cover email.¹⁶

[23] The Director deposes that:

- In the forwarded email, the City was seeking legal advice from its legal counsel.
- The forwarded email was between the City and the City’s lawyer for the purpose of obtaining confidential legal advice for the City and that communication was intended to be confidential.¹⁷

[24] The applicant submits that the names of several City employees in the emails “have caused more questions to be raised of what has been contained in those emails.”¹⁸

Analysis and findings

[25] I am satisfied that legal advice privilege applies to the information at issue under s. 14 for the following reason.

[26] I find that the cover email, most of which I can see, is a communication between only City employees discussing the forwarded email. Based on Lawyer A and the Director’s evidence, which I accept, I am satisfied that the forwarded email is from the City’s manager to the City’s legal counsel and it was prepared in the context of a solicitor-client relationship. I also find that the affidavit evidence demonstrates that the forwarded email was sent for the purpose of seeking and providing legal advice. Therefore, I find that the withheld information reveals a communication between a client and its solicitor about legal advice.

[27] Finally, I accept the City’s affidavit evidence that the City intended its communication in both the forwarded email and the cover email to remain confidential between the City and its legal counsel. There is nothing to suggest otherwise.

[28] In conclusion, I find that all three parts of the test for legal advice privilege are met. Disclosing the withheld information would reveal the City’s confidential

¹⁶ Affidavit #1 of Lawyer A, Exhibit A

¹⁷ Affidavit #1 of Director at para 27.

¹⁸ Applicant’s response submission dated April 13, 2023.

communications with its lawyers about legal advice the City sought and received from its lawyers.

[29] For the above reasons, I conclude the email communication withheld under s. 14 is protected by legal advice privilege, and it may be withheld on that basis.

Advice and recommendations, s. 13

[30] The City applied s. 13(1) to withhold most of the information at issue.¹⁹ Section 13(1) says that 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.

[31] The purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny.²⁰

[32] Section 13(1) applies not only when disclosure of the information would directly reveal advice or recommendations, but also when it would allow accurate inferences about the advice or recommendations.²¹

[33] The term “recommendations” includes material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised and can be express or inferred.²² Further, the courts have found that the term “advice” has a broader meaning than “recommendations”,²³ and includes “an opinion that involves exercising judgment and skill to weigh the significance of matters of fact,” including “expert opinion on matters of fact on which a public body must make a decision for future action”.²⁴

[34] Also, s. 13(1) extends to factual or background information that is a necessary and integrated part of the advice or recommendation.²⁵ This includes factual information compiled and selected by an expert, using their expertise,

¹⁹ Pages 2, 3, 16-22, 23-37, 38, 41-44, 49-53, 111-112, 113, 128-129, 132-139 of the records in dispute.

²⁰ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras 45-51.

²¹ Order 02-38, 2002 CanLII 42472 at para 135. See also Order F17-19, 2017 BCIPC 20 (CanLII) at para 19.

²² *Ibid* at paras 23-24.

²³ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para 24.

²⁴ *College* at para, 113.

²⁵ *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras 52-53.

judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body.²⁶

[35] In addition, past OIPC Orders have found that a document does not automatically contain advice simply because it is a draft, and a public body may withhold only the information from a draft or earlier version that would reveal advice or recommendations by inference based on the changes made between versions.²⁷

[36] In the s. 13 analysis, the first step is to determine whether disclosing the information in dispute would reveal advice or recommendations developed by or for a public body. If it would, then I must decide if ss. 13(2) or (3) apply to the information.

[37] Section 13(2) lists types of information and records that public bodies cannot withhold under s. 13(1), and s. 13(3) says that public bodies cannot use s. 13(1) to withhold information in a record that has been in existence for 10 or more years.

Parties submissions

[38] The City submits that it properly applied s. 13 to withhold the information at issue because this information constitutes advice or recommendations developed by and for the City.²⁸ The City argues that during the investigation about the workplace conduct involving the applicant, the investigator prepared questions that reveal information provided to the City for the purpose of the investigation.²⁹ Also, the City submits that the disputed information consists of communications considering and rejecting options in developing the best plan and preparing a strategy for the investigation.³⁰

[39] The applicant does not specifically address s. 13. I understand from the applicant's submission that in general he disputes the City's application of s. 13(1) to the information at issue.³¹

Analysis and findings

²⁶ *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para 94.

²⁷ Order 00-27, 2000 CanLII 14392 (BC IPC) at p 6, Order 03-37, 2003 CanLII 49216 (BC IPC) at paras 59; Order F14-44, 2014 BCIPC 47 (CanLII) at para 32; Order F15-22, 2015 BCIPC 36 (CanLII) at para 23; Order F18-38, 2018 BCIPC 41 (CanLII) at para 17; Order F17-13, 2017 BCIPC 14 at para 24; F20-37, 2020 BCIPC 43 at para 33.

²⁸ City's initial submission at paras 23-24; City's reply submission at para 20.

²⁹ City's initial submission at para 25.

³⁰ City's initial submission at paras 27-28.

³¹ Applicant's response submission.

[40] I find the some of the information withheld from the responsive records is advice or recommendations developed by or for the City under s. 13(1). It is information that reveals:

- A City employee providing other employees with recommendations and an opinion on additional information those employees should request as part of the investigation process.³²
- A City employee providing another employee advice on what steps to take next.³³ I find some of this information reflects a summary of a factual nature, but it would allow accurate inferences about the advice actually received.³⁴
- Information withheld in a draft letter³⁵ and email³⁶ consisting of advice and recommendations on what the documents should say.

[41] However, I find the balance of the information withheld under s. 13(1) is not advice or recommendations developed by and for the City. My reasons are as follows:

- The information only reflects a summary of what was said about a topic but no advice or recommendation about the topic. For example, some information in the emails is only basic factual information related to the investigation,³⁷ and there are instances where the withheld information is only the subject of emails.³⁸ There is also information that the applicant sent to several City employees and his union.³⁹
- The information consists of questions a City employee prepared as part of the City's investigation.⁴⁰ In my view, this information constitutes questions to ask the applicant about specific conduct in relation to the complaint involving him. I find none of this information contains opinions, advice or recommendations. Rather, it is factual information.

³² Pages 38, 41-42 and 53 of the records in dispute.

³³ Pages 52, 111, 132, 134, 135, 137, 138 and 139 of the records in dispute.

³⁴ For similar reasoning, see Order 02-38, 2002 CanLII 42472 at para; Order F17-19, 2017 BCIPC 20 (CanLII) at para 19.

³⁵ Page 137 of the records in dispute.

³⁶ Page 2 of the records in dispute.

³⁷ Pages 16, 17 and 42 of the records in dispute. Some of the information is information that appears to contain third-party personal information; I will determine whether s. 22 applies to any of this information later.

³⁸ Pages 41 and 43 of the records in dispute.

³⁹ Page 20 of the records in dispute

⁴⁰ Pages 24-27 and 32-37 of the records in dispute. City asserts that some of the information is withheld under s. 22. I will determine whether s. 22 applies to any of this information later.

- The information only reflects questions seeking confirmation of facts about a topic but not advice or recommendations about the topic.⁴¹
- A series of interview questions prepared by a City employee for the purpose of confirming factual information.⁴² A question or request for advice certainly may lead to advice or recommendations, but the question or request itself does not amount to advice under s. 13 unless it would allow accurate inferences as to advice actually received.⁴³ The information here does not allow for any such inferences to be made.

Sections 13(2) and (3)

[42] The next step in the s. 13 analysis is to consider whether any of the circumstances under ss. 13(2) and 13(3) apply to the information that I found would reveal advice or recommendations developed by or for a public body or minister.

[43] The City argues that none of subsections of s. 13(2), including s. 13(2)(a), apply.⁴⁴ The applicant says nothing about ss. 13(2) and 13(3).

[44] Section 13(2)(a) states that a public body must not refuse to disclose “any factual material”. Factual “material” is distinct from factual “information”.⁴⁵ The difference is whether the facts are a necessary and integrated part of the advice. If they are not, then the information is “factual material” and s. 13(2)(a) applies. I have found that some of the information is “factual” in nature.⁴⁶ I find, however, that it is a necessary and integrated part of the advice or recommendations actually received. Therefore, s. 13(2)(a) does not apply.⁴⁷

[45] I also find that the records have not been in existence for 10 or more years. The oldest records at issue were created in 2020. Consequently, s. 13(3) does not apply.

⁴¹ Pages 43-44 and 49-50 of the records in dispute. I will determine whether s. 22 applies to any of this information later.

⁴² Page 51 of the records in dispute.

⁴³ See, for example, Order F14-19, 2014 BCIPC 22 at para 35; For similar reasoning, see Order F17-23, 2017 BCIPC 24 at para 19 in which Adjudicator Whittome found that information that refers to the intention to seek advice or recommendations does not fit within the meaning of s. 13(1).

⁴⁴ City's initial submission at paras 28 and 30.

⁴⁵ *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para 91.

⁴⁶ Pages 52, 132, 134, 135 and 138 of the records in dispute.

⁴⁷ For similar reasoning, see Order 02-38, 2002 CanLII 42472 at para; Order F17-19, 2017 BCIPC 20 (CanLII) at para 19.

[46] Given my findings respecting ss. 13(2) and (3), I conclude that s. 13(1) authorizes the City to withhold some of the information in dispute,⁴⁸ but it does not authorize it to withhold the rest of the information.⁴⁹

Disclosure harmful to third-party personal privacy, s. 22

[47] Section 22(1) requires a public body to refuse to disclose personal information if its disclosure would be an unreasonable invasion of a third party's personal privacy.⁵⁰ Past BC orders have considered the application of s. 22(1), and I will apply those same principles here.⁵¹

Personal information

[48] Since s. 22(1) only applies to personal information, the first step in any s. 22 analysis is to determine whether the information in dispute is personal information.

[49] FIPPA defines personal information as “recorded information about an identifiable individual other than contact information” and contact information 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.”⁵² Previous orders have said that information is about an identifiable individual when it is reasonably capable of identifying an individual, either alone or when combined with other available sources of information.⁵³

[50] The City submits all of the information it withheld under s. 22 is personal information as defined under Schedule 1 of FIPPA.⁵⁴

[51] The applicant does not appear to dispute that the withheld information is personal information. Instead, he argues that this information should be disclosed so he can “find out what actually happened”.⁵⁵

[52] I find that some of the information withheld in emails consists of factual statements about third parties.⁵⁶ I am satisfied that this is information about

⁴⁸ For added clarity, pages 2, 38, 41, 42, 52, 53, 111, 132, 134, 135, 137, 138, 139.

⁴⁹ For added clarity, pages 16, 17, 20, 24-27, 32-37, 41, 42, 43, 44, 49, 50, 51.

⁵⁰ Schedule 1 of FIPPA says: “third party” in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than (a) the person who made the request, or (b) a public body.

⁵¹ See, for example, Order F15-03, 2015 BCIPC 3 (CanLII) at para 58.

⁵² Definitions, Schedule 1 of FIPPA.

⁵³ Order F19-13, 2019 BCIPC 15 at para 16, citing Order F18-11, 2018 BCIPC 14 at para 32.

⁵⁴ City's initial submission at para 48.

⁵⁵ Applicant's response submission.

⁵⁶ Pages 1, 39 and 40 of the records in dispute.

identifiable individuals other than contact information so it is their personal information.

[53] There are several instances where individuals are identifiable by their names or work email addresses.⁵⁷ I find that this information also qualifies as personal information. An individual's work email address in the sender and recipient fields and the signature block of email is generally considered contact information; however, whether information will be considered "contact information" depends on the context.⁵⁸ Having considered the context of those emails, in my view, disclosing such details would reveal which individuals were providing comments, or communicating with each other, about the workplace conduct investigation.⁵⁹ Also, in my view, the email address here is not the information to enable those individuals to be contacted at their place of business.

[54] In addition, there are several instances where City employees discussed interactions they had with the applicant or third parties about the applicant's workplace conduct.⁶⁰ I find this is fact specific or incident-related information that the applicant could use to identify who provided this information, so it is personal information. Also, there are several instances where the City withheld information from emails that the applicant sent to City employees.⁶¹ Some of this information is also the applicant's personal information since it is the third parties' comments about the applicant or their interactions with the applicant.⁶²

Disclosure not an Unreasonable Invasion of Privacy – s. 22(4)

[55] The second step in the s. 22 analysis is to determine whether the personal information falls into any of the types of information listed in s. 22(4). If so, its disclosure is not an unreasonable invasion of third-party personal privacy.

[56] The City submits that none of the s. 22(4) circumstances apply to the information at issue.⁶³ The applicant makes no submission about this.

[57] I have considered if any of the circumstances under s. 22(4) apply to the personal information. In my view, there is no basis for finding that s. 22(4) applies here. The personal information at issue does not, for example, relate to compelling circumstances affecting anyone's health or safety under s. 22(4)(b), any enactment that authorizes the disclosure under s. 22(4)(c), nor any third

⁵⁷ Pages 39 and 40 of the records in dispute.

⁵⁸ Order F08-03, 2008 CanLII 13321 at para 82; Order F14-45, 2014 BCIPC 48 at para 41.

⁵⁹ For similar reasoning, see Order F20-13, 2020 BCIPC 15 at para 42.

⁶⁰ Pages 1, 16, 17, 27, 29, 30, 39, 40, 43, 44 and 128 of the records in dispute. For added clarity, there is some third-party personal information on pages 43-44 and 49-50 of the disputed records that I find must be withheld under s. 22(1) although the City did not withhold it under s. 22.

⁶¹ Pages 13 and 20 of the records in dispute.

⁶² For similar reasoning, see Order F20-37, 2020 BCIPC 43 at para 88.

⁶³ City's initial submission at paras 71-74.

party's position, functions or remuneration as an officer, employee or member of a public body under s. 22(4)(e). I, therefore, conclude that s. 22(4) does not apply.

Presumption of Unreasonable Invasion of Privacy – s. 22(3)

[58] The third step in the s. 22 analysis is to determine whether any provision under s. 22(3) applies to the personal information at issue. If one or more do, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy.

[59] The City submits that ss. 22(3)(g) and (h) apply.⁶⁴ The applicant does not specifically address this.

Recommendations or evaluations – s. 22(3)(g) and (h).

[60] Section 22(3)(g) applies to personal information that consists of personal recommendations or evaluations, character references or personnel evaluations about a third party.

[61] Previous orders have found that s. 22(3)(g) applies to formal performance reviews, job or academic references or an investigator's comments and views about workplace performance and behaviour in the context of a complaint investigation.⁶⁵ However, factual statements and evidence relating to allegations against a third party, including the allegations themselves, are not the kind of evaluative material covered by s. 22(3)(g).⁶⁶

[62] Having reviewed the parties' submissions and records in dispute, I am not satisfied that s. 22(3)(g) applies to the disputed information. I find the withheld information here is factual or background information about interactions City employees had with the applicant.⁶⁷ Also, I find that none of this information is personal recommendations or evaluations about a third party, nor does it extend to a character reference or personnel evaluation about a third party within the meaning of s. 22(3)(g).

[63] Section 22(3)(h) states disclosure of personal information is presumed to be an unreasonable invasion of third-party personal privacy where the applicant could reasonably be expected to know the identity of a third party who provided a personal recommendation or evaluation, character reference or a personnel

⁶⁴ City's initial submission at paras 68-70.

⁶⁵ Order 01-53, 2011 CanLII 21607 (BC IPC) at para 44; Order 01-07, 2001 CanLII 21561 (BC IPC) at para 21; Order F16-46, 2016 BCIPC 51 (CanLII) at para 33; F14-10, 2014 BCIPC 12 (CanLII) at para 19; Order F05-30, 2005 CanLII 32547 (BC IPC) at paras 40-42.

⁶⁶ Order 01-53, 2001 CanLII 21607 (BCIPC) at paras 44-45.

⁶⁷ Page 1 of the records in dispute.

evaluation in confidence. The purpose of s. 22(3)(h) is to protect the identity of someone who provided, in confidence, the type of information described in s. 22(3)(g).⁶⁸ As I have found that s. 22(3)(g) does not apply to the withheld information, it follows that s. 22(3)(h) does not apply.⁶⁹

[64] There is no basis for concluding that any other s. 22(3) presumptions apply here,⁷⁰ and I conclude s. 22(3) does not apply to the withheld information.

Relevant Circumstances – s. 22(2)

[65] The final step in the s. 22 analysis is to consider the impact of disclosure of the personal information in light of all relevant circumstances, including those listed in s. 22(2).

[66] It is at this stage that any applicable s. 22(3) presumption may be rebutted. I found that the withheld personal information at issue does not fall under s. 22(3), so I do not need to consider whether any presumptions are rebutted. However, it is still necessary to consider the relevant circumstances in determining whether disclosure of the withheld information would be an unreasonable invasion of third-party personal privacy.

[67] The applicant does not make any submissions about s. 22(2). The City submits that ss. 22(2)(f), (g) and (h) are relevant to this inquiry,⁷¹ so I will consider those circumstances. I will also consider whether there are any other circumstances that may apply.

[68] Supplied in confidence – s. 22(2)(f): Section 22(2)(f) asks whether the personal information has been supplied in confidence. If so, this factor weighs in favour of withholding the information. In order for s. 22(2)(f) to apply, there must be evidence that an individual supplied the information and that they did so under an objectively reasonable expectation of confidentiality, at the time the information was provided.⁷²

⁶⁸ Order F05-30, 2005 CanLII 32547 (BC IPC), para 42.

⁶⁹ For the sake of added clarity, I find none of the information in dispute consists of a personal recommendation or evaluation, character reference or personnel evaluation (Personal Recommendation or Evaluation) about a third party. Therefore, disclosing the information would not reveal the identity of a third party (or third parties) who supplied the Personal Recommendation or Evaluation nor would it reveal the content of the Personal Recommendation or Evaluation.

⁷⁰ While the City says “information supplied to the [City] in the course of investigation interviews”, it did not specially argue s. 22(3)(b) or (d). I have thought if either of ss. 22(3)(b) or (d) would apply here and I found neither section applies.

⁷¹ City’s initial submission at paras 53, 60 and 66.

⁷² Order F11-05, 2011 BCIPC 5 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).

[69] The City submits that some of the information at issue⁷³ was supplied in confidence in the course of the City's investigation.⁷⁴

[70] I find that some of the emails⁷⁵ state "confidential" in the subject line. I am satisfied that the authors of those emails have a conscious intention to convey that the information is being sent in confidence.

[71] There are instances where the information does not indicate that it was supplied in confidence or there was a reasonable expectation of confidentiality at the time the information was provided.⁷⁶ I, therefore, considered the context and content of information and where there was any basis to suggest that the supplier and receiver of the information mutually understood that the information was being supplied in confidence.

[72] Having reviewed the context and content of the records and evidence,⁷⁷ I am satisfied that the information was supplied in confidence. I find that the individuals who provided City employees with the information were aware that the purpose of their communications related to the workplace conduct investigation involving the applicant.⁷⁸ Given the content of this information, I find it is reasonable to conclude in this case that individuals who provided comments in confidence and expected their identities to be protected and they would not want to distribute that information more widely. Therefore, I am satisfied that s. 22(2)(f) is a relevant factor that weighs in favour of withholding all of the information in dispute.

[73] Inaccurate or unreliable information – s. 22(2)(g): Section 22(2)(g) states that public bodies must consider whether "the personal information is likely to be inaccurate or unreliable". Past OIPC orders have found s. 22(2)(g) is not about whether or not some people may draw inaccurate or unreliable inferences about what the information means⁷⁹ and s. 22(2)(g) is aimed at preventing harm to individuals that can flow from the disclosure of inaccurate or unreliable information about them.⁸⁰

[74] The City asserts that information provided by the applicant in the course of the City's investigation is inaccurate and unreliable.⁸¹

⁷³ Pages 1, 39 and 40 of the records in dispute.

⁷⁴ City's initial submission at para 53.

⁷⁵ Pages 39 and 40 of the records in dispute.

⁷⁶ Pages 1, 16, 17, 24, 26, 27, 30, 32, 34, 35, 36, 43, 44, 49, 50 and 128 of the records in dispute.

⁷⁷ Affidavit #1 the Director of Labour Relations at the City at paras 19 and 20.

⁷⁸ Pages 1, 16, 17, 24, 26, 27, 30, 32, 34, 35, 36, 43, 44, 49, 50 and 128 of the records in dispute.

⁷⁹ Order F17-29, 2017 BCIPC 31 at para 37.

⁸⁰ Order 01-19, 2001 CanLII 21573 (BC IPC) at para 42.

⁸¹ City's initial submission at para 60.

[75] I am not satisfied that any of the information at issue is inaccurate or unreliable. It is not clear to me, and the City does not further explain, which of the information provided by the applicant was specifically found to be inaccurate and unreliable. Also, there is no evidence to suggest that there is any issue as to the accuracy or reliability of the third-party personal information.⁸² As a result, I find that s. 22(2)(g) does not weigh in favour of withholding the personal information.

[76] Unfair damage to reputation – s. 22(2)(h): Section 22(2)(h) considers whether the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant. It has two requirements; first the information must damage an individual's reputation. Second, the damage to an individual's reputation must be unfair.⁸³

[77] The City submits that information provided by the applicant creates negative inferences about the conduct of third parties and disclosing the information could negatively impact their reputations.⁸⁴

[78] Having reviewed the information at issue,⁸⁵ I am not satisfied that disclosure of the personal information may damage the third parties' reputations. The information at issue constitutes the City's interview questions relating to the workplace conduct investigation involving the applicant. These questions are about what the applicant did and what he said about interactions he had with several individuals. I cannot see, and the evidence before me does not demonstrate, how the information would unfairly damage the reputation of the individuals mentioned. I, therefore, conclude that s. 22(2)(h) does not weigh in favour of withholding the personal information.

[79] Applicant's personal information and existing knowledge: I have found that some of the third party's information is simultaneously the applicant's personal information.⁸⁶ This information is about their interactions with each other. The City is withholding this information from several emails that the applicant sent to City employees and from the interview questions the City prepared during its investigation.

[80] I recognize that an applicant will rarely be denied access to their own personal information in order to protect third party personal privacy.⁸⁷ The question here is whether giving the applicant access to his own personal information will unreasonably invade the privacy of others.

⁸² I have reviewed the City's affidavit evidence; none of the paragraphs that the City referred to for arguing s. 22(2)(g) demonstrates that the information is likely to be inaccurate or unreliable.

⁸³ Order F19-02, 2019 BCIPC 2 at para 69.

⁸⁴ City's initial submission at para 66.

⁸⁵ Pages 24-37 of the records in dispute, claimed in the City's initial submission at para 67.

⁸⁶ Pages 13, 20, 25, 26, 29, 33 and 34 of the records in dispute.

⁸⁷ For similar reasoning, see Order 01- 54, 2001 CanLII 21608 (BC IPC) at para 26; Order F20-37, 2020 BCIPC 43 at para 86.

[81] In this case, it is clear that the applicant already knows this information about the third parties because he provided it to the City in the first place. The email indicates the applicant wrote and sent this information to the City so it is unclear how disclosing it to him now would be an unreasonable invasion of the third party's personal privacy. Therefore, I conclude that the applicant's personal information and existing knowledge are circumstances that weigh in favour of disclosure of this information.

Summary and conclusion, s. 22(1)

[82] I find that most of the information the City withheld under s. 22 is the personal information of third parties. Also, there are instances where the third party's personal information is simultaneously the applicant's personal information.

[83] I find that ss. 22(4) and 22(3) do not apply here.

[84] After considering the relevant circumstances, I find that s. 22(2)(f) weighs in favour of withholding some of the personal information because it was supplied in confidence.⁸⁸ Therefore, I conclude that it would be an unreasonable invasion of third-party personal privacy to disclose this information to the applicant.

[85] However, I find the fact that the applicant knew and provided some of the third-party's personal information⁸⁹ is a circumstance that weighs in favour of disclosure of that information. Therefore, it would not be an unreasonable invasion of the third-party's personal privacy to disclose this information to the applicant.

CONCLUSION

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

1. I confirm, in part, the City's decision to refuse the applicant access to information under s. 13(1), subject to item 2 below.
2. The City is authorized to refuse to disclose only the information that I have highlighted on pages 2, 17, 38, 41, 42, 52, 53, 111, 132, 134, 135, 137, 138 and 139. The City is required to disclose the rest of the information it withheld under s. 13(1) to the applicant.

⁸⁸ Pages 1, 16, 17, 24, 26, 27, 30, 32, 34, 35, 36, 39, 40, 43, 44, 49, 50 and 128 of the records in dispute.

⁸⁹ Pages 13, 20, 25, 26, 29, 33 and 34 of the records in dispute.

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3. I confirm the City's decision to refuse the applicant access to information it withheld under s. 14.
 4. I confirm, in part, the City's decision to refuse to disclose information under s. 22(1), subject to item 5 below.
 5. The City is required to refuse to disclose only the information that I have highlighted on pages 1, 16, 17, 24, 26, 27, 30, 32, 34, 35, 36, 39, 40, 43, 44, 49, 50 and 128. The City is required to disclose the rest of the information it withheld under s. 22(1) to the applicant.
 6. The City must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records described at items 2 and 5 above.

[87] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by June 30, 2023.

May 18, 2023

ORIGINAL SIGNED BY

D. Hans Hwang, Adjudicator

OIPC File No.: F21-84864