Order F23-72

FRASER HEALTH AUTHORITY

David S. Adams
Adjudicator

September 12, 2023

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Summary: An applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Fraser Health Authority (FHA) for access to certain records. FHA disclosed the responsive records but withheld some information in them. The applicant requested a review of this decision. FHA also notified a third party that it planned to disclose some records (Audit Reports) to the applicant. The third party requested a review of FHA's decision. The adjudicator determined that FHA was not required to refuse to disclose the Audit Reports under s. 21(1) of FIPPA, but that it was required to refuse to disclose most of the information it withheld under s. 22(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165, ss. 21(1)(a), (b), and (c), 22(1), 22(2)(a), (b), (c), (d), (e), (f), (g), and (h), 22(3)(a), (b), and (d), 22(4), 23, 57(1), (2), and (3).

INTRODUCTION

[1] The applicant, a journalist, requested audit reports from Fraser Health Authority (FHA)'s internal audit branch (Audit Reports), as well as a list of completed requests under FIPPA (FOI List). FHA disclosed the FOI List but withheld some information in it under ss. 15 (disclosure harmful to law enforcement) and 22 (disclosure harmful to personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] FHA did not believe that the Audit Reports were subject to any exceptions to disclosure, and it notified the business that was the subject of the Audit Reports (third party) that FHA planned to disclose them to the applicant. FHA invited the third party to consent to the disclosure or make written representations on why they should not be disclosed. The third party objected to disclosure of the Audit Reports, saying that s. 21(1) of FIPPA (disclosure harmful to third-party business interests) applied to them. FHA ultimately decided that it

was required to disclose the Audit Reports to the applicant and notified the third party of its decision.[1]

[3] The third party asked the Office of the Information and Privacy Commissioner (OIPC) to review FHA's decision on s. 21(1). Meanwhile, the applicant asked the OIPC to review FHA's withholding of information in the FOI List under ss. 15 and 22. Mediation did not resolve the matter, and both the applicant and the third party requested that it proceed to inquiry.

[4] FHA and the third party each provided submissions.[2] FHA's submission included an affidavit from a staff member in its information access and privacy office (the FOI Advisor). The third party's submission included an affidavit from its president (the Third Party President).

[5] The OIPC gave the third party permission to remain anonymous in this inquiry and to provide portions of its submissions on an *in camera* basis. The applicant did not provide submissions or evidence.

ISSUES AND BURDEN OF PROOF

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

1. Whether FHA must refuse to disclose information under s. 21(1) of FIPPA;

2. Whether FHA must refuse to disclose information under s. 22(1) of FIPPA; and

3. Whether FHA may refuse to disclose information under s. 15(1) of FIPPA.

[7] Under s. 57(1) of FIPPA, FHA bears the burden of proving that the applicant has no right of access to the information withheld under s. 15(1).

[8] Under s. 57(2) of FIPPA, the applicant bears the burden of proving that disclosure of personal information under s. 22(1) would not be an unreasonable invasion of third-party personal privacy. However, it is up to FHA to establish that the information at issue is personal information.[3]

[9] Section 57(3)(b) of FIPPA places the burden on the third party to prove that the applicant has no right of access to the Audit Report under s. 21(1).

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[1] FHA's notice to the third party and its decision were issued pursuant ss. 23 and 24 of FIPPA.
[2] The third party's submissions were limited to the s. 21(1) issue.
[3] Order 03-41, 2003 CanLII 49220 (BC IPC) at paras 9-11.

DISCUSSION

Background

[10] FHA is a health authority responsible for delivering publicly funded health care services to residents within the Fraser Health region.[4]

[11] The applicant is an independent journalist. He requested that FHA provide him with:

> (1) Full texts of all audits from [FHA's] internal audit branch, from April 8, 2019, until [January 2, 2020]. Also send a list of plan [sic] of all areas and topics due to be audited.
>
> (2) List of all completed FOI requests from April 8, 2019, until [January 2, 2020].
>
> (3) Executive summaries of all unpublished commissioned reports and external consultant reports – all for the most senior level – from April 8, 2019, until [January 2, 2020].[5]

[12] The third party is a privately held business based in the Lower Mainland. It operates facilities for seniors under an agreement with FHA.[6] In 2019, FHA's internal audit services audited some of the third party's facilities and produced the Audit Reports.

Information in dispute

[13] The information in dispute consists of two Audit Reports and the FOI List.

Audit Reports

[14] The Audit Reports are each entitled "Internal Audit Report – Risk, Compliance, and Performance." One is 16 pages, and the other is 18 pages. They both deal with retirement care centres operated by the third party. They discuss the third party's performance under an agreement with FHA to deliver care home services.

[15] The third party objects to the release of any part of the Audit Reports, relying on s. 21(1) of FIPPA. FHA's position is that s. 21(1) does not apply and that it is required to disclose these documents to the applicant.

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[4] Affidavit of FHA Advisor at paras 2 and 5.
[5] Applicant's original access request dated January 2, 2020.
[6] Affidavit of Third Party President at paras 4-5; Affidavit of FOI Advisor at para 7.

FOI List

[16] The FOI List is a 30-page list of FIPPA requests completed by FHA for the period of April 8, 2019 to January 2, 2020. The FOI List includes file numbers, descriptions of the access requests, the dates the requests were received, and the dates FHA closed them. FHA disclosed most of the information in the FOI List to the applicant but withheld some of it under ss. 15 and 22 of FIPPA.

Disclosure harmful to business interests of a third party – s. 21(1)

[17] Section 21(1) of FIPPA requires public bodies to withhold information whose disclosure could reasonably be expected to harm the business interests of a third party. The relevant portions of s. 21(1) are as follows:

> **21** (1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> …
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
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> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
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> …
>
> (iii) result in undue financial loss or gain to any person or organization…

[18] Section 21(1) creates a three-part test. The third party must establish all three parts: first, that the information in dispute is one or more of the kinds of information contemplated by s. 21(1)(a); second, that the information was supplied, implicitly or explicitly, in confidence, as required by s. 21(1)(b); and third, that disclosure of the information could reasonably be expected to result in one or more of the harms set out in s. 21(1)(c).

[19] As former Commissioner Loukidelis noted with respect to the policy reasons that underlie the application of s. 21(1):

> A central goal of FIPPA…is to make public bodies more accountable to the public through a right of public access to records, subject to only limited

> exceptions. FIPPA should be administered with a clear presumption in favour of disclosure and…nowhere is the right of access more important for the accountability of public bodies to the public than in the arena of public spending through large-scale government outsourcing of public services to private enterprise. Businesses that contract with government must fully appreciate that the transparency of those dealings has no comparison in fully private transactions.[7]

[20] I agree with and adopt this reasoning.

Type of information – s. 21(1)(a)(ii)

[21] The first step in the s. 21(1) analysis is to determine whether the information in the Audit Reports fits within one of the categories set out in s. 21(1)(a).

[22] The third party says the information in the Audit Reports fits within s. 21(1)(a)(ii). It elaborates by saying:

> …the information in the [Third Party] Records meets the test for constituting commercial, financial, technical, and/or labour relations information.
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> The Records contain lots of operational details regarding the Sites, from the product and services that [the third party] delivers to residents, to the pricing structure and financial records for the Sites, to the staffing plan/pattern for the Sites to the way such products and services are delivered (the operational delivery models), all of which constitutes commercial, financial, technical and/or labour relations information under [s. 21(1)(a)(ii)].
>
> The Records are entirely about commercial enterprises and are littered with commercial, financial, labour relations and technical information throughout, from calculations about "Hours Per Resident Day", to how many funded residents there were, to how many care hours were provided and by what position, to actually quoting the base funding figure. The Records even set out the corporate structure of the Third Party and talk specifically about the types of commercial activity that the commercial enterprises are doing and evaluating such activity.[8]

[23] FHA acknowledges that "disclosure of the Disputed Third Party Records would reveal commercial, financial, labour relations, scientific or technical information of or about the Third Party", but does not explain which portions of the Report contain, or would reveal, the kinds of information contemplated by s. 21(1)(a)(ii).

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[7] Order F09-04, 2009 CanLII 14731 (BC IPC) at para 18.
[8] Third party's initial submission at paras 26-28.

[24] In Order F21-12, the adjudicator considered the OIPC's previous orders on this branch of the test and concluded that "commercial information" includes information that "relates to the third party's methods of providing services to its clients" or that "relates to the third party's performance under a contract, in the context of an ongoing commercial relationship with the public body".[9] Information does not need to have an independent market value or be proprietary to qualify as commercial information.[10]

[25] FHA's FOI Advisor deposes that the audit process that resulted in the preparation of the Audit Reports was "to determine whether…FHA's contracted service providers are providing services in accordance with their contracted obligations and consistently with all applicable legal requirements and standards".[11]

[26] I can see that the Audit Reports consist entirely of FHA's evaluation of the third party's performance under their agreement. I accept that this information concerns the commercial relationship between FHA and the third party in that it deals with the third party's methods of providing services to FHA and its compliance with the parties' agreement. It is therefore commercial information within the meaning of s. 21(1)(a)(ii). The information in the Audit Reports therefore satisfies the first branch of the test, and there is no need to consider whether the information also consists of financial, labour relations, and/or technical information. I now turn to consider whether it was supplied to FHA in confidence.

Supplied in confidence – s. 21(1)(b)

[27] The next step in the s. 21(1) analysis is to determine whether the information in the Audit Reports was supplied, implicitly or explicitly, in confidence. The information must be both "supplied" and "supplied in confidence".[12]

Supplied

[28] FHA does not make an explicit submission about whether the third party supplied the information in the Audit Reports to FHA. However, the FOI Advisor deposes that in general, in order to produce an Audit Report, "the FHA Internal Audit team conducts interviews with key personnel, examines management

[9] Order F21-12, 2021 BCIPC 16 (CanLII) at para 23, citing Order F05-09, 2005 CanLII 11960 (BC IPC) at para 18; Order F16-45, 2016 BCIPC 49 (CanLII) at paras 25-26; Order F11-08, 2011 BCIPC 10 (CanLII) at para 17; and Order F18-21, 2018 BCIPC 24 (CanLII) at paras 8-10.
[10] Order F18-40, 2018 BCIPC 43 (CanLII) at para 8; Order 01-36, 2001 CanLII 21590 (BC IPC) at para 17.
[11] Affidavit of FOI Advisor at paras 12-13.
[12] Order F19-11, 23019 BCIPC 13 (CanLII) at para 21.

policies, conducts site visits, reviews systems processes and controls, and examines any relevant records, reports, systems processes and controls".[13]

[29] The third party submits it supplied the information in the Audit Reports to FHA. The Third Party President deposes that the third party "provided [FHA] with the detailed and specific operational information [FHA] required for each of the Sites in order for [FHA] to carry out its audit of the Sites and write its internal report".[14]

[30] The third party also makes submissions about how OIPC orders have interpreted the "supplied" requirement in relation to negotiated agreements or contracts.[15] However, those arguments do not assist the third party in this case because the Audit Reports are not negotiated agreements or contracts; they are reports produced by FHA.[16]

[31] Previous OIPC orders have considered the meaning of "supplied". In general, where the information arises from the judgment and skill of auditors, it will not be held to have been supplied. Conversely, where information in a report would permit the drawing of accurate inferences about supplied information, the information will be held to have been supplied. Reports produced by a public body may contain supplied information as well as information gathered or produced by auditors; what matters is the content of the information rather than the form in which it appears.[17] I agree with and adopt this approach.

[32] The burden is on the third party to establish that it supplied the information. I recognize that audit reports can contain information that is supplied to the auditor,[18] and I find that for a small amount of the information, that is the case here. I accept that the background information about the third party's corporate structure[19] was supplied to FHA, because it is clear on the face of the information that an auditor's judgment was not involved in generating it. It is just a recitation of facts about the third party. However, I am not satisfied by the third party's submissions and evidence that it supplied the rest of the information. In my view, rather, it is clear on the face of this information that it was generated by the FHA auditors' judgment. For example, much of the content of the Audit Reports consists of findings and recommendations clearly authored by the auditors and representing their judgments, analyses, and conclusions. In some cases, FHA points to the *lack* of information supplied by the third party.[20]

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[13] Affidavit of FOI Advisor at para 14.
[14] Affidavit of Third Party President at para 7.
[15] Third party's initial submission at paras 8-10.
[16] No one in the inquiry argued that the Audit Reports were negotiated agreements.
[17] Order F13-28, 2013 BCIPC 37 (CanLII) at paras 25-29.
[18] A similar finding was made in Order F13-28, *supra* note 17.
[19] On page 8 of the first, and page 8 of the second, Audit Reports.
[20] For example, at page 10 of the first Audit Report.

[33] For these reasons, I am not satisfied that the third party supplied the majority of the information in the Audit Reports to FHA. I now turn to consider whether the information I have found was supplied was supplied in confidence.

In confidence

[34] Previous OIPC orders have said that information will be held to have been supplied in confidence if it was supplied with an objectively reasonable expectation of confidentiality. Evidence of the third party's subjective intentions is not enough, on its own, to establish a reasonable expectation. The circumstances to be considered include whether the supplied information was:

1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
3. not otherwise disclosed or available from sources to which the public has access;
4. prepared for a purpose which would not entail disclosure.[21]

[35] Neither party points to an express statement of confidentiality with respect to the *supply* of the information, and on my review of the Audit Reports, I am unable to find one. The third party says that it supplied the information in the Audit Reports to FHA in a "confidential and private capacity and manner". It points out that the Audit Reports have the word "confidential" printed on every page, and that the cover page of each Audit Report states: "This report is confidential and has been prepared for internal use only". It says that it reasonably expected FHA to keep the information confidential, since disclosure of the information could allow the third party's competitors to compete unfairly against it and affect the third party's ability to attract new residents.[22]

[36] The Third Party President deposes that:

> The information incorporated into the [Audit Reports] was supplied explicitly and implicitly in confidence to [FHA], which confidentiality the Third Party…understood would be maintained by [FHA]. The Third Party…[relies] on the implicit understanding that information such as the information in the [Audit Reports] will not be improperly disclosed or used except for the purposes of administering the relationship between the Third Party and [FHA] and the operations of the Sites. Particularly when the reason such sensitive information was being requested from the Third Party by [FHA] in the first

[21] Order 01-36, 2001 CanLII 21590 (BC IPC) at paras 23-26; Order F21-12, 2021 BCIPC 16 (CanLII) at paras 34-43.
[22] Third party's initial submission at paras 33-37.

> place was for an "Internal Audit Report" which has the word "confidential" written on every page.[23]

[37] I can see that the Audit Report is marked "confidential" on its cover and on each of its pages. While this marking can be a contextual indication of the third party's reasonable expectation of how the information would be treated, its appearance does not necessarily mean that all of the information in the Audit Report was supplied in confidence by the third party to FHA. Rather, in my view, it means that the finished product, i.e., the Audit Report itself, is confidential.

[38] On the contextual evidence before me, while it is somewhat uncertain, I think it is more likely than not that the parties treated the supplied information in the Audit Reports in a confidential manner. I see no indication that the information was disclosed to anyone other than FHA. I accept the third party's evidence that it relied on an implicit understanding that the information would be used only to administer and audit the parties' relationship and the third party's sites. I conclude that the small amount of information that I have found was supplied by the third party was supplied under a reasonable expectation of confidentiality.

Reasonable expectation of harm - s. 21(1)(c)

[39] The final step in the s. 21(1) analysis is to determine whether disclosure of the information that was supplied in confidence could reasonably be expected to harm the third party's business interests under s. 21(1)(c). Since I have found that most of the information in the Audit Reports was not supplied to FHA for the purposes of s. 21(1)(b), I do not need to consider that non-supplied information under this branch of the test; however, I will do so for the sake of completeness.[24]

[40] The Supreme Court of Canada has consistently held that the formulation "could reasonably be expected to" in access to information statutes sets out a middle ground between what is probable and what is merely possible. The party asserting a reasonable expectation of harm, while not required to prove on a balance of probabilities that harm will occur, must provide evidence "well beyond" or "considerably above" a mere possibility of harm.[25] Moreover, there must be a "clear and direct connection" between disclosure of the specific information in dispute and the anticipated harm.[26]

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[23] Affidavit of Third Party President at para 11.
[24] Adjudicators have adopted this approach in previous OIPC orders: see Order F13-22, 2013 BCIPC 29 (CanLII) at para 44; and Order F21-12, 2021 BCIPC 16 (CanLII) at para 45.
[25] *Merck Frosst Ltd. v. Canada (Health)*, 2012 SCC 3 at paras 195-206 [*Merck Frosst*]; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para 54.
[26] *Merck Frosst*, *supra* note 15 at para 197, citing *Lavigne v. Canada (Office of the Commissioner of Official Languages*), 2002 SCC 53 at para 58.

[41] The third party submits that disclosure of the Audit Reports could reasonably be expected to harm its competitive position, result in undue financial loss, and/or provide its competitors with undue gains.[27]

[42] FHA says only that the "generalized nature" of the harm contemplated by the third party does not meet the requirements of s. 21(1) of FIPPA.[28] The FOI Advisor deposes that in FHA's opinion, there is "not a sufficient nexus between much of the information in issue and any potential harm arising from disclosure to justify withholding under s. 21" of FIPPA.[29]

Harm to third party's competitive position or interference with negotiating position – s. 21(1)(c)(i)

[43] The third party says that disclosure of the Audit Reports would harm the third party's competitive position because disclosure would allow its competitors to gain an advantage in the marketplace by copying the third party's business model, or tailoring their bids for future work commissioned by FHA.[30] It says that only "a small number of businesses" are in its market for seniors' services.[31]

[44] The Third Party President deposes that the process for bidding on retirement home projects is "extremely competitive" with a small number of competitors, but he does not elaborate.[32] He deposes that disclosure of the Audit Reports would allow the third party's competitors to compete unfairly against it.[33] However, he does not explain how he expects this unfair competition to happen, nor does he attempt any quantification of the harm he expects to the third party's competitive or negotiating position.

[45] Previous OIPC orders have held that harm to a third party's competitive position or interference with its negotiating position is not enough to satisfy the requirements of s. 21(1). The legislature added the qualifier "significant" in order to indicate that something more than mere harm was needed. "At the very least," wrote the former Commissioner, "the party bearing the burden of proof must prove that the anticipated harm is, when looked at in light of the circumstances affecting the third party's competitive position or negotiating position, a material harm".[34]

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[27] Third party's initial submission at para 19.
[28] FHA's initial submission at para 61.
[29] Affidavit of FOI Advisor at para 17.
[30] Third party's initial submission at paras 40-43.
[31] *Ibid* at para 22.
[32] Affidavit of Third Party President at para 6.
[33] *Ibid* at para 13.
[34] Order 00-10, 2000 CanLII 11042 (BC IPC) at section 3.7.

[46] Further, previous OIPC orders have held that the fact that disclosure of the disputed information might heighten competition is not enough to engage s. 21(1)(c). For instance, in Order F22-55 the adjudicator said:

> …each set of contract negotiations is unique and involves give and take from all parties. The fact that a party in a future negotiation may use information gained from the information at issue to take a firmer stance, does not mean, necessarily, that [a third party] will incur greater costs or be forced to agree to terms that are less advantageous to it.[35]

[47] I am not persuaded that disclosure of the Audit Reports could reasonably be expected to significantly harm the third party's competitive position or interfere significantly with its negotiating position. The evidence provided by the third party does not, in my view, demonstrate that disclosure could reasonably be expected to cause *any* harm to the third party's competitive position or interfere with its negotiating position, let alone a harm that is significant. Likewise, on my review of the information itself, I cannot easily see how a competitor could use the information to gain an advantage. Rather, it seems to me that the third party's evidence and arguments are speculative, lacking the kind of concreteness and specificity that would ground a reasonable expectation of probable harm.

Undue financial loss or gain – s. 21(1)(c)(iii)

[48] The third party says that disclosure of the Audit Reports could harm its reputation and cause it undue financial loss.[36] It says that "disgruntled residents or their family members" could use the information to launch a meritless lawsuit against the third party, the defence of which would impose an undue cost on it.[37] It also says that disclosure of the information could lead to a negative perception of the third party's facilities among prospective residents, leading to a loss of business.[38]

[49] With respect to an undue gain, it says that if a competitor got access to its "business information", the competitor would reap a windfall, gaining a business advantage without having to spend time or money.[39] The Third Party President deposes that the third party, through its years in the retirement home industry, has built up "a structure, reputation, and leadership in the community" which could be copied by competitors, essentially handing them a windfall gain if the Audit Reports were disclosed to the applicant.[40]

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[35] Order F22-55, 2022 BCIPC 62 (CanLII) at para 34.
[36] Third party's initial submission at paras 45-46.
[37] *Ibid* at para 47.
[38] *Ibid* at para 48.
[39] *Ibid* at para 41.
[40] Affidavit of Third Party President at paras 13 and 16.

[50] Previous OIPC orders have said that the meaning of "undue" includes gains or losses that are "excessive, disproportionate, unwarranted, inappropriate, unfair or improper, having regard to the circumstances of each case".[41] Previous OIPC orders have also said that if a competitor can be shown to gain an advantage effectively for nothing, the gain will be undue.[42]

[51] In this case, I am not persuaded by the third party's argument and evidence about its undue loss and its competitors' undue gains. The third party does not explain what features of its business model would be revealed by disclosure of the Audit Reports, nor does it explain, beyond speculating, how any resulting losses or gains would reasonably be expected to occur, let alone how these losses or gains would be undue. I therefore conclude that the third party has not met its burden of proving that disclosure of the Audit Reports could reasonably be expected to result in an undue loss or gain to any person or organization under s. 21(1)(c)(iii).

Conclusion on s. 21(1)

[52] To summarize, I have found that s. 21(1)(a) applies to the Audit Reports because they are the commercial information of the third party. I have found that most of the information in the Audit Reports was not supplied by the third party within the meaning of s. 21(1)(b), but that the small amount of information it did supply was supplied with a reasonable expectation that FHA would keep it confidential. However, I have found that the third party has not discharged its burden of proving a reasonable expectation of harm under s. 21(1)(c)(i) or (iii). As a result, none of the information in the Audit Reports passes all three branches of the s. 21(1) test. FHA is not required to refuse to disclose any information in the Audit Reports under s. 21(1).

Unreasonable invasion of third-party personal privacy – s. 22(1)

[53] Section 22(1) of FIPPA says that a public body must refuse to disclose personal information if disclosure would be an unreasonable invasion of a third party's personal privacy. The analytical framework for s. 22(1), which I will apply, is well established:

> Numerous orders have considered the approach to s. 22 of FIPPA, which states that a "public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy." This section [applies only] to "personal information" as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal

[41] Order F14-58, 2014 BCIPC 62 (CanLII) at para 54, citing Order 00-10, 2000 CanLII 11042 (BC IPC) at 17-19.
[42] Order F14-04, 2014 BCIPC 4 (CanLII) at para 61.

> privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.[43]

[54] FHA relies on s. 22(1) to withhold information from the FOI List, which is a list of summaries of the access requests received by FHA between April 8, 2019 and January 2, 2020.[44] FHA submits that each branch of the s. 22 test supports withholding the severed information.[45]

[55] The applicant did not make any submissions about the application of s. 22(1).

Personal information – s. 22(1)

[56] The first step in the s. 22 analysis is to determine whether the withheld information is personal information. Both "personal information" and "contact information" are defined in Schedule 1 of FIPPA:

> "personal information" means recorded information about an identifiable individual other than contact information;
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> "contact information" means 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;

[57] Previous OIPC orders have said that information is about an identifiable individual when it is reasonably capable of identifying a particular individual or a small group of people, either alone or when combined with other available sources of information.[46]

[58] FHA says that all the information it withheld under s. 22(1) is personal information because it is either an individual's name or is information about a third party's "family, employment, allegations, activities or services accessed" which would allow someone to infer the third parties' identities.[47]

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[43] Order F15-03, 2015 BCIPC 3 (CanLII) at para 58.
[44] FHA's initial submission at paras 23-24.
[45] *Ibid* at para 32.
[46] Order F20-13, 2020 BCIPC 15 (CanLII) at para 36; Order F16-36, 2016 BICPC 40 (CanLII) at para 17.
[47] FHA's initial submission at para 37.

[59] FHA also says that some of the information, while not directly revealing the identity of individuals, would nevertheless allow the applicant to infer their identities via the "mosaic effect", which is a term that is sometimes used to describe the process where seemingly innocuous, non-identifying information could be combined with information available from other sources to deduce individuals' identities.[48]

[60] The information FHA is withholding consists mostly of names, descriptions of events associated with the names, and addresses. In my view, most of this information is personal information because it is reasonably capable of identifying individuals. I find that none of the information is contact information as FIPPA defines that term, because it is not information that would allow the third parties to be contacted at their place of business.

[61] However, there is some information that I do not find is reasonably capable of identifying individuals.[49] For example, I cannot see how the withheld pieces of information at the top of page 21 of the FOI List are capable of identifying individuals. FHA did not explain how disclosing this specific information would reveal the identity of individuals, including by way of the mosaic effect. Therefore, I find that s. 22(1) does not apply to this information. As the adjudicator pointed out in Order F21-47, "a public body must explain the logic that leads to the conclusion that it is reasonable to expect that [the mosaic effect] might apply. Mere speculation is insufficient to establish its application in a particular case".[50]

Not an unreasonable invasion of third-party personal privacy – s. 22(4)

[62] FHA submits that no s. 22(4) circumstances apply to the withheld information. Its submissions, however, raise the issue of whether s. 22(4)(e) applies.

[63] Section 22(4)(e) says that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff.

[64] FHA says that some of the information is about individual's position with a public body, but s. 22(4)(e) does not apply when such information is in "the context of an investigation, allegation or other similar circumstance."[51] FHA does not identify where that information is in the records.

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[48] *Ibid* at paras 36-37.
[49] Namely, the information I have highlighted on pages 21 and 30 of the records package.
[50] Order F21-47, 2021 BCIPC 55 (CanLII) at para 17.
[51] FHA's initial submission at para 38.

[65] Based on my review of the personal information, it is not apparent that any of it is about an officer, employee or member of a public body or member of a minister's staff, let alone about their position, functions or remuneration. For that reason, I find that s. 22(4)(e) does not apply to any of the personal information in the FOI List.

[66] I also find that no other s. 22(4) circumstances apply.

Presumed unreasonable invasion of third-party personal privacy – s. 22(3)

[67] Section 22(3) sets out a list of circumstances where disclosure is presumed to be an invasion of a third party's personal privacy. FHA argues that ss. 22(3)(a), (b), and (d) apply to some of the personal information.

Medical history – s. 22(3)(a)

[68] Section 22(3)(a) of FIPPA provides that disclosure of personal information is presumed to be an unreasonable invasion of third-party personal privacy if the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation.

[69] FHA says that "some" of the personal information (it does not specify which) would reveal individuals' "residence at a care facility; whether a [third party] was enrolled in workplace health benefits; and [third parties'] medical conditions and diagnoses".[52]

[70] I can see that some of the withheld information relates on its face to individuals' medical conditions and/or treatments.[53] I find that s. 22(3)(a) applies to that information and its disclosure is presumed to be an unreasonable invasion of third-party personal privacy.

Investigation into a possible violation of law – s. 22(3)(b)

[71] Section 22(3)(b) of FIPPA provides that disclosure of personal information is presumed to be an unreasonable invasion of third-party personal privacy if the personal information "was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation".

[72] FHA says that "some" of the withheld information (again, it does not specify which) relates to third parties "who are involved in criminal, regulatory and workplace investigations", and that "[all] such investigations are conducted under criminal or quasi-criminal legislation and therefore constitute an

[52] FHA's initial submission at para 42.
[53] Namely, some of the information withheld on pages 4-7, 12-15, 18-19, 22, and 24-26.

'investigation into a possible violation of law' within the meaning of" s. 22(3)(b) of FIPPA.[54]

[73] There is some personal information that I find was compiled and is identifiable as part of an investigation into a possible violation of law.[55] This information is, on its face, clearly about a city's request to FHA for information about a named individual the city is investigating for allegedly violating the *Tobacco and Vapour Products Control Act.*[56] That Act is a BC statute that contains provisions that impose sanctions for its violation (including warnings, tickets and administrative penalties). I am therefore satisfied that this personal information was compiled and is identifiable as part of an investigation into a possible violation of law, so s. 22(3)(b) applies. Disclosing that personal information is presumed to be an unreasonable invasion of the personal privacy of the third party it identifies.

[74] However, I find that s. 22(3)(b) does not apply to the rest of the personal information given the lack of explanation and supporting evidence. While FHA says the personal information relates to investigations conducted under criminal or quasi-criminal statutes, it does not explain or identify the statutes or say where that specific personal information is in the FOI List. None of that is apparent based on my review of the records. I also reject FHA's argument that all workplace investigations are conducted under criminal or quasi-criminal legislation.

Employment or occupational history – s. 22(3)(d)

[75] Section 22(3)(d) provides that disclosure of personal information is presumed to be an unreasonable invasion of third-party personal privacy if the information relates to the third party's employment, occupational, or educational history.

[76] FHA says that some of the personal information relates to third parties' "employment history, conduct, employee identification numbers, and involvement in a workplace complaint or investigation", so its disclosure is presumed to be an unreasonable invasion of their privacy under s. 22(3)(d).[57]

[77] I agree with FHA that some of the information relates to various workplace investigations involving third parties and that it therefore relates to their occupational and/or employment history.[58] I find that disclosure of this

[54] FHA's initial submission at para 44.
[55] On page 5 of the records package.
[56] RSBC 1996 c 451.
[57] FHA's initial submission at paras 46-47.
[58] Namely, some information withheld on pages 5-6, 11, 20, 24-26, and 28.

information is presumed to be an unreasonable invasion of their personal privacy under s. 22(3)(d).

[78] There is also some information that is not obviously connected to workplace investigations but may otherwise relate to third parties' employment and/or occupational history. Some of this withheld information consists of third parties' employee numbers. Previous OIPC orders have held that a person's employee number is part of their employment history for the purposes of s. 22(3)(d).[59] I make a similar finding here. There are also some employee birthdates. OIPC orders have held that s. 22(3)(d) does not apply to employees' birthdates since "a person's date of birth is not normally created and assigned to that person as part of their employment".[60] I find that s. 22(3)(d) does not apply to the employee birth dates on pages 11 and 28 of the records package.

Other s. 22(3) presumptions

[79] FHA does not argue that any other s. 22(3) presumptions apply. I have considered the information and find that none of the other s. 22(3) presumptions apply.

Relevant circumstances – s. 22(2)

[80] The final step in the s. 22 analysis is to consider whether, in light of all the relevant circumstances, including those set out in s. 22(2), disclosure of the information at issue would be an unreasonable invasion of third-party personal privacy.

[81] FHA submits that none of the factors set out in s. 22(2) favour disclosure of the withheld information, and many of the factors support withholding the information. In particular, it says that:

- Disclosure would not be desirable for subjecting FHA's activities to public scrutiny under s. 22(2)(a);
- Disclosure is not likely to promote public health and safety or to promote the protection of the environment under s. 22(2)(b);
- The personal information is not relevant to a fair determination of the applicant's rights under s. 22(2)(c);
- Disclosure of the personal information will not assist in researching or validating the claims of Indigenous peoples under s. 22(2)(d);

[59] Order F20-49, 2020 BCIPC 58 (CanLII) at para 20; Order F14-41, 2014 BCIPC 44 (CanLII) at para 46.
[60] Order F20-49, *ibid* at para 21.

- The identities of access applicants and other third parties were supplied in confidence under s. 22(2)(f);
- "…there was a likelihood that some of the references to unproven allegations against third parties were unreliable" under s. 22(2)(g).[61]

[82] FHA also says that ss. 22(2)(e) and (h) support withholding the information because it is "sensitive personal information about individuals who are alleged to have been perpetrators or victims of criminal activity; individuals who are going through divorce proceedings; individuals who are facing workplace allegations; and information about minors who have been removed from care facilities". FHA also submits that disclosure would be "harmful, stigmatizing and embarrassing" for the third parties and their families.[62]

[83] For the information I have found is subject to the ss. 22(3)(a), (b) and (d) presumptions, I find that there are no circumstances which favour disclosure and could rebut the presumptions. I agree with FHA that ss. 22(2)(a), (b), (c), (d), (e), (f), (g), and (h) either do not apply or do not favour disclosure and therefore find that the presumptions have not been rebutted with respect to that information.

[84] For the information I have found is not subject to a s. 22(3) presumption, I find as follows. First, much of the withheld information reveals the identities of access applicants and previous OIPC orders have held that personal information in access requests is not necessarily supplied in confidence, even if the public body treats it confidentially. What counts is whether the supplier of the personal information at issue provided the information in confidence.[63] In this case, I do not think there is enough information, either on the face of the records or in the parties' submissions and evidence, to allow me to infer the intentions of the access applicants, and so I find that this factor weighs neither for nor against disclosure.

[85] FHA is withholding the name of an individual who was registered with the Office of the Registrar of Lobbyists of BC. The name appears in a summary of an access request for records related to the lobbyist's lobbying of FHA. In my view, disclosure of the lobbyist's name would not reveal anything about the content of the requested records or about the lobbyist's communications with FHA. It would reveal only the fact that someone requested access to FHA's records regarding its interactions with a registered lobbyist who was acting in their public-facing, professional capacity. It reveals nothing of a personal or sensitive nature about the lobbyist. I am satisfied that disclosure of the lobbyist's name in the context of page 28 of the records where it appears would not be an unreasonable invasion of the lobbyist's personal privacy.

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[61] FHA's initial submission at para 49.
[62] *Ibid* at para 50.
[63] Order F21-32, 2021 BCIPC 40 (CanLII) at para 118.

[86] The applicant has not pointed to any factors favouring disclosure of any of the remaining information, and on my review of the withheld information in light of the relevant circumstances, I am unable to discern any.

Conclusion on s. 22(1)

[87] To summarize, I have found that most of the information FHA withheld under s. 22(1) is personal information. I have found that no s. 22(4) circumstance applies. I have found that ss. 22(3)(a), (b) and (d) apply to some of the personal information so that its disclosure is presumed to be an unreasonable invasion of third-party personal privacy, and that there are no relevant factors that would rebut these presumptions. I have found that the non-sensitive nature of some of the personal information on page 28 of the FOI List supports disclosure of that information. I have found no relevant factors that support disclosing any of the remaining personal information in dispute.

[88] On the whole, I find that the applicant has not met his burden of proving that disclosure of the information withheld under s. 22(1) would not be an unreasonable invasion of third-party personal privacy. FHA must therefore refuse to disclose most of the information that I have found is personal information, with the exception of the personal information on page 28 of the records package that I described above.

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

[89] FHA also argues that s. 15(1) of FIPPA applies to some of the information in the FOI List that it withheld under s. 22(1). Since I have found that all of the information withheld under both sections must be withheld under s. 22(1), there is no need to consider the application of s. 15(1).

CONCLUSION

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

1. I confirm FHA's decision that it is not required to refuse to disclose the disputed information under s. 21(1) of FIPPA. I require FHA to allow the applicant access to this information.

2. Subject to item 3 below, FHA is required to refuse to disclose some of the information it withheld under s. 22(1).

3. FHA is not required to refuse to disclose the information it withheld under s. 22(1) that I have highlighted on pages 21, 28, and 30 of the records package, a copy of which is provided to FHA with this order. It must provide this information to the applicant.

4. FHA must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records/pages described at items 1 and 3 above.

[91] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by **October 25. 2023**.

September 12, 2023

ORIGINAL SIGNED BY

David S. Adams, Adjudicator

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