Order F24-79

THE CITY OF NEW WESTMINSTER

Carol Pakkala
Adjudicator

August 28, 2024

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Summary: An applicant requested The City of New Westminster (City) provide access under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to records relating to the end of its former Fire Chief's employment. The City withheld some information under ss. 14 (solicitor client privilege), 17 (disclosure harmful to financial or economic interests of public body), and 22 (unreasonable invasion of third party personal privacy) of FIPPA and common law settlement privilege. The adjudicator found the City was authorized to withhold the information under settlement privilege and required to withhold some, but not all, of the information at issue under s. 22. The adjudicator further found the City was not authorized to withhold the information at issue under s. 14. The adjudicator ordered the City to disclose the information it was not authorized or required to withhold.

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

INTRODUCTION

[1] The applicant, a journalist, made four requests for access to records under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to The City of New Westminster (City). The requests were for records relating to the end of the employment of the City's former Fire Chief and to the City's handling of one of those access requests.

[2] The City disclosed some information but withheld information under ss. 14 (solicitor client privilege), 17 (harm to public body's financial or economic

interests), and 22 (unreasonable invasion of third party personal privacy) of FIPPA[1], and common law settlement privilege.

[3] The applicant requested a review by the Office of the Information and Privacy Commissioner (OIPC) of the City's responses to each of the four requests.

[4] Mediation conducted by the OIPC failed to resolve the matters and the applicant requested they proceed to inquiry. For expediency, the four reviews were consolidated into this single inquiry. Both parties provided submissions in this inquiry.

[5] The City requested, and received, permission from the OIPC to provide some information in its submissions and affidavit evidence *in camera* (that is, for only the Commissioner, and not the applicant, to see).[2]

[6] During this inquiry, the City withdrew its reliance on s. 17.[3]

[7] The OIPC identified the Fire Chief as an appropriate person under s. 54(b) but he chose not to participate in this inquiry.[4]

Preliminary Matter

Late raising of constitutional challenge, s. 2 of the Charter

[8] In his submission, the applicant says the City infringed his rights under s. 2 of the *Canadian Charter of Rights and Freedoms*[5] (Charter). Section 2 of the Charter protects the fundamental freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication.

[9] The applicant says that, by delaying and denying disclosure, the City effectively supressed his ability to report on a matter of self-evident public interest prior to the 2022 civic election.[6] The applicant does not further explain the alleged breach of s. 2 of the Charter or why he did not seek permission to add this issue to the inquiry.

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[1] From this point forward, when I refer to sections, I am referring to sections of FIPPA unless I indicate otherwise.
[2] OIPC's *in camera* decision letter dated April 30, 2024.
[3] Affidavit of City's Records Analyst at para 39 and confirmed by email from City's counsel dated August 8, 2024.
[4] The City confirmed to the OIPC investigator that the Fire Chief did not wish to participate. During this inquiry, I wrote to the Fire Chief to advise the inquiry was proceeding and he further confirmed that he did not wish to participate.
[5] *Canadian Charter of Rights and Freedoms*, s. 2, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 a.
[6] Applicant's submission at para 4.

[10] The OIPC's notice of inquiry and its *Instructions for Written Inquiries*, both of which were provided to the applicant, clearly explain that parties may not add new issues without the OIPC's prior consent. Previous orders of the OIPC have consistently said the same thing.[7] There is no indication on the OIPC record that the applicant:

- Requested permission to add s. 2 of the *Charter* as an issue to this inquiry.
- Provided notice of constitutional question to the provincial and federal Attorneys General as required by the *Constitutional Question Act*.[8]

[11] I can see no exceptional circumstances that warrant adding the s. 2 *Charter* issue into the inquiry at this late date. Therefore, I will not add this issue or consider the applicant's *Charter* argument any further.

ISSUES AND BURDEN OF PROOF

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

1. Common law settlement privilege authorizes the City to refuse to disclose the information at issue.

2. Section 14 authorizes the City to refuse to disclose the information at issue.

3. Section 22 requires the City to refuse to disclose the information at issue.

[13] The party seeking to rely on settlement privilege has the burden of proving its claim.[9] In this case, that means the City bears the burden.

[14] Under s. 57(1), the City has the burden of proving that the applicant has no right of access to the information it withheld under s. 14.

[15] Under s. 57(2), the applicant has the burden of showing that disclosure of the information in dispute under s. 22(1) is not an unreasonable invasion of a third party's personal privacy. However, the City bears the initial burden of showing that the information in dispute is personal information.

DISCUSSION

[7] See for example, Order F19-41, 2019 BCIPC 46 at para 5.
[8] *Constitutional Question Act*, RSBC 1996, c. 68.
[9] *Shooting Star Amusements Ltd. v. Prince George Agricultural and Historical Association*, 2009 BCSC 1498 at para. 9, leave to appeal dismissed at 2009 BCCA 452 (CanLII). This allocation of burden has been adopted by the OIPC for settlement privilege. See for example: Order F17-35, 2017 BCIPC 37 (CanLII) at para 7; Order F23-36, 2023 BCIPC 30 (CanLII) at para 17; and Order F18-06, 2018 BCIPC 8 (CanLII) at para 9.

Background

[16] This inquiry concerns a series of requests by the applicant to The City of New Westminster (City) for access to records relating to the end of the employment of its Former Fire Chief (Fire Chief).

[17] In 2021, the Fire Chief was involved in negotiations with the City and those parties reached a settlement agreement.[10] The subject matter of those negotiations and settlement agreement was received *in camera* so I am limited in what I can say about it.

[18] The Fire Chief retired from the City effective October 28, 2021.[11] The applicant requested access records related to the Fire Chief's departure in a series of four requests.

Information at issue

[19] In response to the four combined requests, the City identified 141 pages of responsive records and disclosed some information in those records to the applicant. The City withheld information from 117 of those pages.

[20] The information at issue is found in lists compiling payroll data into tables (payroll tables), emails, and letters. The records are about:

- All individual payments made to the Fire Chief for two specified time periods (before and after retirement) including the dollar amounts, dates, transaction and invoice numbers, and reasons for payments (Disputed Record 1 and Disputed Record 2).
- All records relating to the City's handling of the first request (Disputed Record 3).
- All correspondence between the Fire Chief and the City's Chief Administrative Officer (CAO) for a specified time period (Disputed Record 4).

Settlement Privilege

[21] Settlement privilege is not an exception to disclosure set out in Part 2 of FIPPA. However, the BC Supreme Court has found that since FIPPA contains no clear legislative intent to abrogate settlement privilege, parties are entitled to rely on it to refuse to disclose information responsive to an access request under FIPPA.[12]

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[10] Affidavit of the City's Manager of Legal Services (Manager) at paras 3-8.
[11] Affidavit of the City's Record's Analyst at para 5.
[12] *Richmond (City) v Campbell*, 2017 BCSC 331 at para 72.

[22] The purpose of protecting information from disclosure through settlement privilege is to encourage the resolution of disputes prior to litigation. Settling disputes is a priority for the justice system at large.[13] The underlying premise of settlement privilege is that the ability to rely on it promotes honest and frank discussions during negotiations by removing the fear that information will be used against the disclosing party in litigation.[14]

[23] The BC Supreme Court describes the test for settlement privilege as follows:

> 1. A litigious dispute must be in existence or within contemplation (although it is not necessary for proceedings to have actually been commenced);
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> 2. The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and
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> 3. The purpose of the communication must be to attempt to affect a settlement of the dispute between the parties.[15]

[24] This test has been consistently adopted by the OIPC[16] and I do the same here.

[25] Settlement privilege applies to negotiations, whether or not the parties reach an agreement, as well as to concluded agreements and settlement amounts.[17]

[26] Settlement privilege is not limited to communications exchanged by counterparties in settlement negotiations but may extend to undisclosed internal discussions undertaken by one party about the settlement negotiations they are engaged in.[18]

[27] Settlement privilege can be set aside where there is a competing public interest which outweighs the public interest in encouraging the settlement of disputes.[19]

Parties' submissions, settlement privilege

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[13] *Union Carbide Canada Inc. v. Bombardier Inc.,* 2014 SCC 35 (CanLII), at para 32.
[14] *Ibid* para 31.
[15] *Nguyen* v. *Dang*, 2017 BCSC 1409 (CanLII) at para 22.
[16] See for example: Order F24-018, 2024 BCIPC 24 (CanLII) at para 14; Order F23-26, 2023 BCIPC 30 (CanLII) at para 22; and Order F18-06, 2018 BCIPC 8 (CanLII) at para 60.
[17] *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 [*Sable*] at paras 17-18.
[18] *Thomas v, Rio Tinto Alcan Inc.,* 2019 BCSC 421 (CanLII) at para. 80 and *Concord Pacific Acquisitions Inc. v. Oei*, 2016 BCSC 2028 at para 52.
[19] *Sable, supra* note 16 at para 19.

[28] The City says the evidence clearly establishes that the test for settlement privilege is met. Much of this evidence was submitted to the OIPC *in camera,* as was some of what the City says about how this evidence meets the test for settlement privilege.

[29] Apart from its *in camera* evidence and submissions, the City says there were negotiations between the City and Fire Chief that led to a settlement agreement. The City further says these negotiations were conducted with the intention that they would not be disclosed to the court and a settlement agreement was reached. [20] Finally, the City says it was reasonable to expect that if the negotiations had failed, the City may have ended up in a litigious dispute with the Fire Chief.[21]

[30] The applicant does not comment directly on whether the elements of settlement privilege are met. Rather, he says that the public interest exception to settlement privilege applies:

> There is no greater public interest than that of the health and safety of a community and the hiring, firing and retirement of those that are the most senior decision makers in the departments that are responsible for public safety. The fire department is such a division of the City of New Westminster.[22]

[31] The applicant says the sudden retirement of the Fire Chief resulted in a period of unstable leadership in the fire department.[23]

[32] In response to the applicant's comments about public interest, the City says the applicant has not provided any evidence of any health or public safety risks or other matter that would require the disclosure of the information in this inquiry.[24]

Analysis, settlement privilege

[33] The City withheld information in the payroll tables, entire emails, and the settlement agreement under settlement privilege. For the reasons that follow, I find that the above test is met for all the information to which the City applied settlement privilege. I further find there is insufficient evidence to support setting settlement privilege aside on the basis of a competing public interest.

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[20] City's initial submission at para 41.
[21] City's initial submission at para 40.
[22] Applicant's submission at para 9.
[23] Applicant's submission at para 3
[24] City's reply submission at para 4.

[34] After reviewing the records and affidavit evidence, I am satisfied that there was a litigious dispute. Disclosure of the information at issue would reveal the terms of settlement of the litigious dispute or would enable the settlement terms to be inferred. Such disclosure would, in my view, defeat the very purpose of settlement privilege. It is also clear to me that the information at issue was intended to be confidential. I find settlement privilege extends to all of this information. I cannot say any more without revealing the *in camera* information.

Exceptions to settlement privilege

[35] As I noted above, settlement privilege can be set aside where there is a competing public interest that outweighs the public interest in encouraging the settlement of disputes. Here, the applicant says the health and safety of a community is a matter of significant public interest. While I agree with that point, I do not see evidence of a risk to public health and safety based solely on the retirement of one employee. The applicant does not adequately explain why that would be the case. For this reason, I find there is insufficient evidence to set aside settlement privilege.

Conclusion on settlement privilege

[36] For the reasons above, I find that settlement privilege applies to the information in the payroll tables, the emails, and to the settlement agreement.

Solicitor client privilege, s. 14

[37] Section 14 allows a public body to refuse to disclose information that is subject to solicitor client privilege. Section 14 encompasses two kinds of privilege recognized at common law: legal advice privilege and litigation privilege.[25] The City relies on legal advice privilege.

[38] For information to be protected by legal advice privilege it must be contained in a communication that was:

- between a solicitor and client (or their agent);
- intended by the solicitor and client to be confidential; and
- made for the purpose of seeking or providing legal advice.[26]

[39] Not every communication between a solicitor and their client is privileged. If the conditions above are satisfied, then privilege applies.[27] A communication does not, however, satisfy this test merely because it was sent to a lawyer.[28]

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[25] *College of Physicians of BC v British Columbia (Information and Privacy Commissioner), 2002 BCCA 665* at para 26.
[26] *Solosky v. The Queen*, [1980] 1 SCR 821 at p. 837.
[27] *Ibid* at p. 829.
[28] *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180 at paras 61 and 81.

[40] The courts have established the following principles, among others, for deciding if legal advice privilege applies:

- Privilege extends beyond the actual requesting or giving of legal advice to the "continuum of communications" between a lawyer and client, which includes the necessary exchange of information for the purpose of providing legal advice.[29]
- Internal client discussions about the implications of legal advice provided by a lawyer are privileged because revealing these communications would reveal the substance of the privileged legal advice.[30]

Parties' submissions, legal advice privilege

[41] The City outlines the established law regarding legal advice privilege and claims it applies to the following:

- a name and email address;
- a statement which it says expresses an intent to seek legal advice on a particular issue; and
- entire emails addressed to legal counsel (and others).

[42] The applicant does not say anything about legal advice privilege.

Analysis, legal advice privilege

[43] For the reasons that follow, I find legal advice privilege does not apply to any of the information withheld on that basis.

[44] The City provided the records it withheld under legal advice privilege for my review in this inquiry. The City also provided affidavit evidence from its Manager of Legal Services (Manager) and its Records Analyst. In my view, neither affidavit is helpful for the legal advice privilege analysis. For example, the Manager's evidence is that he had "legal discussions" with the City's then-FOI Coordinator.[31] He does not say how, or even if, those discussions relate to the specific information at issue.

Name and email address

[45] The City has relied on legal advice privilege to withhold one individual's name and email address from several emails.[32] The body of the emails have

[29] *Huang v Silvercorp Metals Inc*., 2017 BCSC 795 at para. 83; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at para. 42.
[30] *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District,* 2013 BCSC 1893 (CanLII) at paras. 22-24.
[31] Manager's affidavit at para 13.
[32] Disputed Record 3 at pp.4,5, 32, and 33.

been disclosed to the applicant. Based on the City's submissions, I understand that this individual is a lawyer. The City says that it was entitled to withhold the name and email address on the basis that disclosing that information would reveal the nature of the relationship and financial arrangements between the City and that person, and would disclose information about the seeking, formulating, or giving of legal advice.

[46] The authorities relied upon by the City establish that while the existence of a solicitor client relationship is not privileged, the terms of such a relationship, including information relating to financial arrangements between solicitor and client, are privileged.[33]

[47] I can see that the name and email address at issue is included along with others in the address and cc lines of certain emails. While the severed information may allow one to infer the existence of a solicitor-client relationship between the City and this individual, I fail to see, and the City does not explain, how this name and email address in the context of these emails discloses anything about the nature of any solicitor client relationship or about financial arrangements between a solicitor and client. For these reasons, I find that legal advice privilege does not apply to the name and email address.

Statement

[48] The City says legal advice privilege applies to a sentence within certain email communications because it states an intent to seek legal advice on a particular issue.[34] This sentence is in an email between two City employees who are discussing how to sever the records under FIPPA, and the author of the email suggests that certain decisions about the severing will be left to other individuals. The sender and the recipient of the email are not lawyers and the email is not copied to a lawyer. Based on my review of the email and its context, the severed sentence reveals nothing about legal advice sought or obtained or any other communication that took place with the City's legal counsel.

[49] The City's submissions and evidence do not sufficiently explain how this sentence reveals a communication between a solicitor and client (or their agent), and I am not persuaded that it does. I considered whether this statement formed part of a continuum of communications between lawyer and client, but I am not persuaded that it even relates to legal advice.

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[33] City's initial submission at para 53, citing *Order F05-10,* 2005 BCIPCD No. 11, 2005 CanLII 11961 (BC IPC), at para 13, referencing *Legal Services Society* v. *British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278 and *Legal Services Society* v. *British Columbia (Information and Privacy Commissioner)*, [1996] BCJ No. 2034, 1996 CanLII 1780 (BCSC).
[34] City's initial submission at para 54. This information is on p. 12 and repeated on p. 21 of Disputed Record 3.

[50] For these reasons, I find legal advice privilege does not apply to this statement.

Entire emails

[51] The City says certain emails in their entirety are privileged because they were emails sent directly to legal counsel providing information and revealing discussions.[35]

[52] The fact that an email is addressed to legal counsel is insufficient on its own to satisfy the test for legal advice privilege.[36] The City does not explain how that alone is enough in this case to engage legal advice privilege. Based on my review of the withheld emails, I am not persuaded that they were made for the purpose of seeking or providing legal advice.

[53] I see that these emails provide a summary of the status of information access requests in the City's internal process. The summary includes only general descriptive information about a number of different access requests. The summary does not include any references to the applicable sections of FIPPA or to its interpretation. I considered whether the summary might form part of a continuum of communications between lawyer and client, but I am not persuaded.

[54] For these reasons, I find legal advice privilege does not apply to these emails.

Conclusion, s. 14

[55] I find that legal advice privilege does not apply to the information the City withheld under s. 14.

Disclosure harmful to personal privacy, s. 22

[56] The City's application of s. 22 to some of the information at issue overlapped with its application of settlement privilege. I will only consider the City's application of s. 22 to information that I have not already found may be withheld on the basis of settlement privilege. This information is:

- certain amounts and explanations of amounts in the payroll tables; and
- information contained in emails in Disputed Records 3 and 4.

[35] City's initial submission at para 55.
[36] *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180 at paras 61 and 81.

[57] Section 22(1) requires a public body to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. A "third party" is defined in Schedule 1 of FIPPA as any person, group of persons or organization other than the person who made the access request or a public body.

[58] Previous orders have considered the proper approach to the application of s. 22 and I apply those same principles here.[37]

Personal information

[59] Section 22(1) applies only to personal information, so the first step in a s. 22 analysis is to decide if the information at issue is personal information.

[60] FIPPA defines personal information as "recorded information about an identifiable individual other than contact information." Contact information is defined 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."[38] Whether information is contact information depends upon the context in which it appears.

[61] The City says the information it severed under s. 22 is personal information because it is about identifiable individuals and is not contact information.[39] The applicant says there is no third party personal privacy for a public official.[40]

[62] From my review of the information at issue under s. 22, I find that most of it meets the definition of personal information. This information, which appears in payroll tables and emails, relates to identifiable individuals, either on its own or when combined with information from other information in the records. I am satisfied that none of this personal information is contact information as defined under FIPPA and interpreted by past orders.

[63] I find there is some information that is not personal information. It is in an email chain providing an update about the City's activities.[41] The City withheld the entire email chain. I find that the subject line and date of the email chain are not personal information because they are not about identifiable individuals. I further find the names, positions and titles, and business email addresses in the

[37] Order F15-03, 2015 BCIPC 3 (CanLII) at para 58 sets out a summary of the steps in a s. 22 analysis which I follow here.
[38] FIPPA, Schedule 1.
[39] City's initial submission at para 87.
[40] Applicant's submission at para 10.
[41] Disputed Record 4, pp. 1-3.

address and signature lines of the email chain are contact information so they are not personal information and cannot be withheld under s. 22(1).

[64] I turn now to whether disclosure of the personal information would be an unreasonable invasion of third party personal privacy.

Not an unreasonable invasion of privacy, s. 22(4)

[65] The second step in a s. 22 analysis is to assess whether the personal information falls into any of the types of information listed in s. 22(4). If so, then its disclosure is not an unreasonable invasion of personal privacy.

[66] The City says none of the circumstances in s. 22(4) apply. The applicant says s. 22(4) should prevail.

I reviewed the various provisions under s. 22(4) and find that only s. 22(4)(e) is relevant to the information at issue.

Section 22(4)(e) – position, functions or remuneration

[67] Under s. 22(4)(e), it is not an unreasonable invasion of a third party's personal privacy to disclose personal information 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.

[68] It is well-established that s. 22(4)(e) applies to "objective, factual statements about what the third party did or said in the normal course of discharging [their] job duties, but not qualitative assessments of those actions."[42] Past orders have found that "remuneration" includes the components of an employee's pay, not just the total amount.[43]

[69] The City says that none of the exceptions in s. 22(4) apply. The City further says that s. 22(4)(e) does not apply because it applies only to personal information about an employee's job duties in the normal course of their work-related activities, such as objective factual information about what employees said or did in the normal course of doing their jobs.[44]

[70] The applicant says the information sought was clearly about the third party's position, functions and remuneration as the Fire Chief with the City. The applicant says disclosure of the information would reveal the financial details of

[42] Order 01-53, 2001 CanLII 21607 (BCIPC) at para 40.
[43] Order F15-17, 2015 BCIPC 18 (CanLII) at paras 20-27.
[44] City's initial submissions at para 89 citing Order F21-08, 2021 BCIPC 12 (CanLII) at para 117 and Order 01-53, 2001 CanLII 21607 (BCIPC) at para 40.

the Fire Chief's contract to supply services, including any discretionary benefits of a financial nature.[45]

[71] The City says in reply that there is no provision in FIPPA to preclude s. 22 from applying to municipal employees.[46] The City says the information at issue is about a specific employee, rather than the activities of public employees in general.[47]

Analysis, s. 22(4)(e)

[72] I find the information in the payroll tables is clearly about the Fire Chief's "renumeration" and therefore falls under s. 22(4)(e). Disclosure of information "about" the remuneration of a public body employee includes disclosure of the individual elements that make up the "remuneration" such as paid vacation.[48] The City is not required to withhold this information under s. 22(1) and I will not consider it further.

[73] I find that the information in the email chain about City activities[49] is about the functions of the individuals identified in that email chain. This email chain describes who will be doing what to carry out the City's activities. The email chain also contains objective, factual statements about what third parties did or said in the normal course of discharging their job duties, and do not include qualitative assessments of those actions. Therefore, I find s. 22(4)(e) also applies to this information.

[74] However, I find that s. 22(4)(e) does not apply to other information about what employees said and did. That information is not objective factual information about what those employees said or did in the normal course of their jobs. I cannot provide further details because the evidence about that information was provided *in camera*.

Presumed invasion of privacy, s. 22(3)

[75] The third step in the s. 22 analysis is to determine whether s. 22(3) applies to the personal information at issue. If so, disclosing that personal information is presumed to be an unreasonable invasion of third party personal privacy.

[45] Applicant's submission at para 11.
[46] City's reply submission at para 5.
[47] City's reply submission at para 6.
[48] Order F10-05, 2010 BCIPC 8 (CanLII) at para 41.
[49] Disputed Record 4, pp. 1-3.

[76] The City says ss. 22(3)(a) and (d) are relevant. The applicant does not say anything relevant to s. 22(3). I have considered whether any of the other subsections in s. 22(3) apply and I find no others are relevant.

Health information, s. 22(3)(a)

[77] Section 22(3)(a) creates a rebuttable presumption against disclosure where the personal information relates to medical, psychiatric or psychological history, diagnosis, condition, treatment, or evaluation.

[78] The City says s. 22(3)(a) applies to certain emails. Further details were provided *in camera* so I cannot discuss them. I have reviewed the information at issue and I am satisfied that s. 22(3)(a) does apply as outlined by the City. Disclosure of this personal information is, therefore, presumed to be an unreasonable invasion of third party personal privacy.

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

[79] 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.

[80] The City says s. 22(3)(d) applies to extremely sensitive third party employment information. Further details were provided *in camera* so I cannot discuss them.

[81] Based on my review of the information at issue, I find that s. 22(3)(d) also creates a presumption against disclosure of some of the information because it is about the employment and occupational history of third party employees. For example, emails about retirement matters contain information about that employee's employment history.[50]

[82] I find that no other s. 22(3) presumptions apply.

Relevant circumstances, s. 22(2)

[83] The fourth and final step in a 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). These circumstances can weigh either in favour

[50] Order F11-02, 2011 BCIPC 2 (CanLII) at para. 31; Order F15-60, 2015 BCIPC 64 (CanLII) at para 33.

of, or against, its disclosure. It is at this step, after considering all relevant circumstances, that any presumptions under s. 22(3) may be rebutted.

[84] The City says none of the circumstances listed in s. 22(2) weigh in favour of disclosure and that s. 22(2)(f) and (h) weigh against disclosure. I consider these sections below.

[85] The applicant does not specifically identify any of the circumstances listed in s. 22(2). In my view, the applicant's comments about the public's right to scrutinize the reasons for the departure of the City's Fire Chief are relevant to s. 22(2)(a) so I also consider this section.

Section 22(2)(a) – public scrutiny of a public body

[86] Section 22(2)(a) states that a relevant circumstance to consider under s. 22(1) is whether the disclosure is desirable for the purpose of subjecting the activities of a public body to public scrutiny.

[87] The purpose of s. 22(2)(a) is to foster accountability of a public body. It is not about scrutinizing the actions of individual third parties.[51] If it applies, s. 22(2)(a) weighs in favour of disclosure of the information at issue.

[88] The applicant says the information about the departure of the City's Fire Chief is necessary to scrutinize the City's management of scarce public funds and to give the public a fulsome picture of the City's activities.

[89] I find that disclosure of the remaining personal information at issue would not assist the applicant in scrutinizing the actions of the City with regards to how it manages scarce public funds, because the information is not about expenditures.

[90] I am also not persuaded that disclosure of the information at issue is desirable for giving the public a fulsome picture of the City's activities. The information is about individual employees and their individual circumstances. In my view, disclosure of the information at issue may result in scrutiny of individual third parties, but I am not satisfied it is desirable for scrutinizing the City's activities.

[91] As a result, I find that s. 22(2)(a) does not apply.

Section 22(2)(f) – supplied in confidence

[92] Section 22(2)(f) says that a relevant circumstance to consider is whether the personal information was supplied in confidence. Section 22(2)(f) requires

[51] Order F23-26, 2023 BCIPC 30 (CanLII) at para 80.

evidence that an individual supplied the information under an objectively reasonable expectation of confidentiality at the time they supplied the information.[52] If it applies, s. 22(2)(f) weighs in favour of withholding the information at issue.

[93] The City says the subject matters of the correspondence are inherently confidential and the correspondence was prepared for a purpose that would not entail disclosure.[53] The City points to objective indicators of confidentiality such as written and verbal statements. Further details are *in camera* so I cannot discuss them.

[94] Based on my review of the personal information and its context, I am satisfied that some of it was supplied with the expectation that it would not be shared beyond those who needed to know. As a result, I find that s. 22(2)(f) is a relevant circumstance that weighs in favour of withholding some of the personal information.

Section 22(2)(h) – disclosure may unfairly damage reputation

[95] Section 22(2)(h) says a relevant circumstance to consider is whether disclosure may unfairly damage the reputation of any party referred to in the records. If it applies, s. 22(2)(h) weighs in favour of withholding the information at issue.

[96] The City says that some of the information at issue contains personal information which, if disclosed, could unfairly damage the reputation of one of its employees. It provided further details *in camera*.

[97] In my view, the personal information discussed in the City's *in camera* submission, if disclosed, would unfairly damage the reputation of a City employee. As a result, I find that s. 22(2)(h) is a relevant circumstance that weighs in favour of withholding the information.

Other relevant factors, s. 22(2)

[98] Section 22(2) says that all relevant circumstances must be considered. I find there are no other circumstances not listed under s. 22(2) that require consideration.

Conclusion, s. 22

[52] Order F23-66, 2023 BCIPC 77 (CanLII) at para 69 citing Order F11-05, 2011 BCIPC 5 (CanLII) at para 41, citing Order 01-36, 2001 CanLII 21590 (BCIPC) at paras 23-26.
[53] City's initial submission at para 100.

[99] I found most of the information remaining at issue that the City withheld under s. 22(1) is the personal information of third parties.

[100] I found that s. 22(4)(e) applies to the personal information in the payroll tables and to the personal information in the email chain about City activities.

[101] I found that the disclosure of some of the personal information at issue is presumed to be an unreasonable invasion of third party personal privacy under ss. 22(3)(a) and (d). I found that s. 22(2)(f) and (h) are relevant circumstances weighing in favour of withholding this personal information and that s. 22(2)(a) is not a relevant circumstance. I have found that there are no relevant circumstances favouring disclosure.

[102] I find that disclosing the third party personal information to which s. 22(4)(e) does not apply would be an unreasonable invasion of personal privacy under s. 22(1) and the City must refuse to give the applicant access to that information.

CONCLUSION

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

1. I confirm that the City is authorized to refuse access to the information it withheld under common law settlement privilege.

2. The City is not authorized to refuse to disclose the information withheld under s.14.

3. Subject to item 4 below, I require the City to refuse to disclose the information withheld under s. 22.

4. The City is not authorized or required under ss. 14 or 22 to refuse to disclose the information withheld on:

    a. the top half of page 1 of Disputed Record 1, being the right hand column ending with the entry on October 15, 2021;

    b. pages 1-2 of Disputed Record 2;

    c. pages 4, 12, 21, 32, 14-17, 24-25, 26-27, 28-29, and 30-31 of Disputed Record 3; and

    d. pages 1-3 of Disputed Record 4.

5. The public body is required to give the applicant access to the information outlined in item 4 above.

6. The public body must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records/pages described at item 4 above.

[104] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by October 11, 2024.

August 28, 2024

ORIGINAL SIGNED BY

Carol Pakkala, Adjudicator

OIPC File Nos.: F22-89669, 89670, 89671, 89672