OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 01-07

MINISTRY OF SOCIAL DEVELOPMENT AND ECONOMIC SECURITY

David Loukidelis, Information and Privacy Commissioner
February 23, 2001

Quicklaw Cite: [2001] B.C.I.P.C.D. No. 7
Order URL: http://www.oipcbc.org/orders/Order01-07.html
Office URL: http://www.oipcbc.org
ISSN 1198-6182

Summary: The applicant requested a copy of confidential investigation reports, and confidential witness statements, respecting two investigations into the applicant's complaint about a manager's behaviour. Ministry disclosed the bulk of the investigation reports in both investigations. The withheld witness statements and other information about the manager's behaviour are part of manager's employment history under s. 22(3)(d), but are not personal evaluations or personnel evaluations of the manager under s. 22(3)(g). The information, which was submitted by third parties in confidence under s. 22(2)(f), is not relevant to a fair determination of the applicant's legal rights, so s. 22(2)(c) does not apply. Disclosure would not unfairly expose third parties to harm or unfairly damage their reputations under s. 22(2)(e) or (h). The applicant is not entitled to personal information submitted in confidence for purposes of the investigations, including the manager's personal information and the witnesses' personal information. Section 22(5) summary not required in this case.

Key Words: workplace investigation – personal information – opinions or views – submitted in confidence – unreasonable invasion of personal privacy.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(c), (e), (f) and (h), 22(3)(d), (g) and (h), 22(5).

Authorities Considered: B.C.: Order No. 27-1994, [1994] B.C.I.P.C.D. No. 30; Order No. 70-1995, [1995] B.C.I.P.C.D. No. 43; Order No. 144-1997, [1997] B.C.I.P.C.D No. 26; Order No. 194-1997, [1997] B.C.I.P.C.D. No. 55; Order No. 286-1998, [1998] B.C.I.P.C.D No. 81; Order No. 324-1999, [1999] B.C.I.P.C.D No. 37; Order 00-11, [2000] B.C.I.P.C.D No. 13; Order 00-53, [2000] B.C.I.P.C.D. No. 57. **Ontario:** Order 37, [1989] O.I.P.C. No. 1; Order P-1414, [1997] O.I.P.C. No. 162; Order P-1055, [1995] O.I.P.C. No. 472; Order MO-1285 [2000] O.I.P.C. No. 45; Order P-651 [1994] O.I.P.C. No. 104.

Cases considered: *British Columbia Ferry Corp.* v. *British Columbia Ferry and Marine Workers' Union*, [1999] B.C.C.A.A.A. No. 385; *Greater Vancouver Mental Health Service Society* v. *British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

1.0 INTRODUCTION

[1] This inquiry has its origins in a complaint made by the applicant, in the spring of 1998, to her employer, which is now part of the Ministry of Social Development and Economic Security ("Ministry"). The applicant complained that another employee – whom I will call the "manager" – had inappropriately used her managerial authority in relation to the applicant. The applicant's complaint resulted in two separate investigations by the Ministry under the collective agreement in place between the Province and the British Columbia Government Employees' Union ("BCGEU"). In these investigations, Ministry investigators interviewed various witnesses. Both investigations found that the applicant's complaint was not substantiated.

[2] Several months after the close of the second investigation, the applicant (by a document dated August 28, 1998) requested, under the *Freedom of Information and Protection of Privacy Act* ("Act"), access to the investigation reports and all witness statements. The Ministry took nine months to respond, a time that is well outside the statutory timelines laid down by the Act. The Ministry's decision, as communicated in a May 18, 1999 letter to the applicant, was to disclose only portions of the responsive records. The Ministry's reasons for withholding information read as follows:

> The records have been reviewed and information consistent with Section 22(1) of the Act has been removed. That section states:
>
> > The head of 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.

[3] By a letter dated June 15, 1999, the applicant requested a review, under s. 52 of the Act, of the Ministry's decision. Although the Ministry released further information to the applicant (including two sets of interview notes) on more than one occasion as a result of mediation by this Office, the matter did not settle during mediation. I therefore held a written inquiry under s. 56 of the Act.

2.0 ISSUE

[4] The only issue here is whether the Ministry is required by s. 22(1) of the Act to refuse to disclose personal information to the applicant. Under s. 57(2) of the Act, the applicant bears the burden of establishing that disclosure of the personal information would not unreasonably invade the personal privacy of third parties, *i.e.*, the manager and the witnesses. Consistent with previous orders, the burden is on the Ministry to establish that the applicant's own personal information cannot be disclosed to her without unreasonably invading the personal privacy of third parties.

3.0 DISCUSSION

[5] **3.1 Workplace Investigations and the Act** – Many public bodies covered by the Act conduct workplace investigations into employees' behaviour toward each other, toward members of the public (or customers), toward students and so on. Investigations may be required by a collective agreement or may be voluntary. Regardless of their nature, or their origins, such investigations are an almost everyday fact of life for public bodies. They can involve serious allegations – such as sexual harassment or racial discrimination – or address less serious matters. Whatever their focus, workplace investigations are often conducted in an emotionally charged atmosphere. The consequences for the person being investigated can be serious; witnesses and complainants may also have a great deal to lose. Entire workplaces can become unbearable and an employer can find it difficult to restore harmony (not to mention productivity).

[6] Workplace investigations ordinarily require discretion, tact and professionalism. All relevant facts must be ascertained and appropriate factual findings must be made. One way in which the investigation process may be enhanced is by conducting it in confidence, in which case witnesses will be interviewed, and investigators will deliberate and deliver findings, entirely or partly in confidence.

[7] Some of the arguments advanced by the Ministry in this case focus less on the personal privacy interests of the third parties than on the Ministry's interest in preserving, generally, the confidentiality of its investigations. It argues that its ability to conduct investigations would be harmed by disclosure of the disputed information. In its initial submission, the Ministry relies on Order No. 144-1997, [1997] B.C.I.P.C.D. No. 26, in which my predecessor agreed there should be a "cloak of confidentiality" with respect to the work of public bodies that conduct complaint investigations. In that case, my predecessor agreed, at p. 8, that

> … it is essential to the effective conduct of complaint investigations, especially for sensitive matters, that staff of public bodies charged with such responsibilities should have a cloak of confidentiality to do their work.

[8] The disputed records enjoy no greater protection under the Act because they are the product of a workplace investigation. Whether or not one refers to a 'zone' or 'cloak' of confidentiality, the issue of whether information can or must be withheld has to be addressed on an exception-by-exception basis in the circumstances of each case. As I noted in Order No. 324-1999, [1999] B.C.I.P.C.D. No. 37, it may well be that one or more of the Act's exceptions to the right of access will – alone or in combination – lead to the same result as the application of a 'zone' or 'cloak' of confidentiality. But there is no discrete disclosure exception under the Act known as a zone or cloak of confidentiality. Although I am alive to the sensitivity of investigation reports and related records, the same principles apply in these cases as apply in other cases.

[9] I am not persuaded by the Ministry's argument that disclosure here will harm its ability to conduct other investigations of this kind. Such an argument has, in the employment investigation context, been rejected in a number of labour arbitration cases, where investigation reports and materials have been ordered disclosed despite such an argument. I also rejected such a 'chilling' argument in Order 00-11, [2000] B.C.I.P.C.D No. 13, where a self-regulating body made the same submission.

[10] On another theme – one that is sounded again below – my function under the Act does not include 'levelling the playing field' or trying to achieve 'fairness' between parties. The only judgement required in the s. 22 analysis lies in determining whether the facts favour disclosure of personal information or require its protection. Whether or not that analysis is said to involve a kind of balancing, one must adhere to the statutory language of s. 22 in making that determination.

[11] **3.2 Nature of the Disputed Information** – The disputed records are the two investigation reports produced by Ministry investigators and the witness interview notes they took. Approximately 40 pages of interview notes, which were withheld almost entirely from the applicant, are in dispute. As for the investigation reports, the Ministry withheld the identities of the various witnesses and references that would disclose the witnesses' identities.

[12] Whose personal information is involved in this case? At various points in her submissions, the applicant asserts she has a right of access to the remaining information because it is her "personal information". The Ministry, by contrast, submits that "most of the information withheld from" the applicant is "clearly the personal information of third parties", since it consists "largely of statements made by employees with respect to a complaint about the conduct of a third party" (para. 4.10, initial submission).

[13] Schedule 1 to the Act defines "personal information" as "recorded information about an identifiable individual". The definition goes on to list, non-exhaustively, a number of examples of personal information. Most of the severed information is, in my view, the manager's personal information. It consists of statements made by third parties – recorded in the interview notes and investigation reports – about the manager's conduct. The disputed information also includes the names of various witnesses whom the investigators interviewed. The Act's definition of "personal information" expressly encompasses an individual's name. The question respecting this information is whether the Ministry is required to withhold the names – and any other information that would disclose the third parties' identities – so as not to unreasonably invade the third parties' personal privacy. Last, some of the information is about the applicant and qualifies as her personal information.

[14] The information about the manager is personal information even though it relates to events occurring in the course of employment. In this respect, I agree with the view taken in Ontario, where it has been held that information relating to an investigation into, or assessment of, the employment conduct of a public body employee is that employee's "personal information". See, for example, Ontario Order MO-1285, [2000] O.I.P.C. No. 45, at p. 8. Similarly, the information about the applicant is her personal

information, just as the information about the third party witnesses is theirs. Does 22(1) require the Ministry to refuse to disclose the various parties' personal information?

[15] **3.3 Presumed Unreasonable Invasions of Privacy** – 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." Section 22(3) creates several presumed unreasonable invasions of personal privacy, while s. 22(2) requires a public body to consider all relevant circumstances – including those set out in s. 22(2) – in deciding whether personal information must be withheld. The relevant portions of ss. 22(2) and (3) read as follows:

> 22(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> …
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
>
> …
>
> (e) the third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence,
>
> …
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (d) the personal information relates to employment, occupational or educational history,
>
> …
>
> (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,
>
> (h) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation, … .

[16] Before dealing with the merits of the s. 22(1) issues, a few words are in order about the Ministry's submissions on the evidence needed to rebut a s. 22(3) presumption of unreasonable invasion of personal privacy. At paragraph 4.34 of its initial submission, the Ministry cites Order No. 27-1994, [1994] B.C.I.P.C.D. No. 30, as support for the proposition that "an applicant must provide clear and compelling evidence to show" that a presumption has been rebutted before personal information will be disclosed.

[17] I do not believe that, in referring to "clear" and "compelling" evidence in Order No. 27-1994, my predecessor intended to stipulate an evidentiary burden of "compelling"

evidence in order for an applicant to rebut a s. 22(3) presumption. An applicant must, in order to rebut a s. 22(3) presumption, provide a specific reason – based on evidence, as appropriate – to conclude that the presumption has been rebutted.

[18] Turning to the main issues, the applicant's s. 22(3) submissions are concise. In her initial submission, she says simply that ss. 22(3)(a) through (j) "do not apply and are not relevant in this matter." In her reply submission, she says the relevance of ss. 22(3)(d), (g) and (h) "certainly needs to be questioned, particularly in the case of taking notes during an investigation and the standard practice of an investigator". The focus of her reply submission, as it relates to s. 22(3), really is on her allegation that the "investigations were poorly conducted" and not directly on the application of s. 22(3)(d), (g) or (h).

Personal Information Relating to Employment History

[19] The notes of interviews with third party witnesses, and the investigation report summaries of what they said, constitute the manager's personal information and the applicant's personal information to the extent they record what witnesses said about those individuals' actions, in the course of their employment, as individuals. That information is factual information – about what those individuals said or did – and "relates to" their employment history as individuals. It is not information about the position, functions or remuneration of those individuals or the how, when or why of their discharge of official functions. It therefore falls outside s. 22(4)(e) of the Act. For another example of the need to distinguish between information subject to s. 22(3)(g) and information subject to s. 22(4)(e), see Order 00-53, [2000] B.C.I.P.C.D. No. 57. In that case, the public body wrongly withheld, under s. 22(3)(d), facts as to the manner in which an employee discharged employment functions.

[20] Because it is subject to s. 22(3)(d), disclosure of the manager's personal information to the applicant is presumed to unreasonably invade the manager's personal privacy. This conclusion is, I note, consistent with the position taken in Ontario Order MO-1285, [2000] O.I.P.C. No. 45**.**

Personal or Personnel Evaluations

[21] The Ministry argues that the presumed unreasonable invasion of personal privacy created by s. 22(3)(g) also applies, specifically to the portions of the investigation reports that evaluate the manager's performance and behaviour. I agree, but only where the reports evaluate the manager's performance. The witness statements themselves – as recorded in the interview notes or in the reports themselves – are not evaluations within the meaning of s. 22(3)(g). The witnesses' statements of fact are not evaluative material, which is what I conclude the Legislature intended to cover under this section. Section 22(3)(g) only applies to the portions of the investigation reports in which the investigators assess or evaluate the applicant's or the manager's actions. See, also, Order 00-53, where I held that records in which an employee's job performance was commented upon, as part of a formal 'performance review', constituted the kind of evaluative material that is covered by s. 22(3)(g).

Confidential Personal Evaluations

[22] The Ministry argues (at para. 4.38 of its initial submission) that, "to the extent that the information can be characterized as personal evaluations", the disclosure of which would reveal the identities of those who supplied the evaluations in confidence, s. 22(3)(h) applies. Although the Ministry did not say so, I conclude that this submission relates to the supposed evaluations of both the applicant's conduct and of the manager's conduct. For the reasons given above, this material does not qualify as evaluations under s. 22(3)(g). Nor is it subject to s. 22(3)(h).

[23] **3.4 Do Relevant Circumstances Favour Disclosure?** – The applicant argues that a number of relevant circumstances favour disclosure. She relies, notably, on ss. 22(2)(c) and (h). She also says administrative fairness – which she claims was denied in the Ministry's investigations – requires disclosure to her of the case she has to meet. It bears repeating that no complaint was made against the applicant; she complained about someone else's conduct.

Personal Information Supplied In Confidence

[24] The Ministry says all of the witnesses whose statements are at the centre of this case supplied information to the Ministry in confidence. The Ministry says s. 22(2)(f) is, therefore, relevant to whether or not the disputed personal information can be disclosed. I detect some suggestion in the Ministry's submissions that confidentiality weighs especially heavily on the side of non-disclosure.

[25] Section 22(2)(f) is, of course, only one relevant circumstance in determining whether personal information must be withheld. Confidentiality is not a bar against disclosure of information under the Act. For this reason, a public body must, in embarking on an investigation, be cautious in giving assurances of confidentiality to potential witnesses or others. An assurance of confidentiality is certainly not a veto on disclosure. There can be no absolute guarantee of confidentiality, under the Act or otherwise. (In unionized workplaces, labour arbitrators have ruled that 'confidential' investigation reports and interview notes must be disclosed, in certain circumstances, to enable a party to prepare for an arbitration. See, for example, *British Columbia Ferry Corp.* v. *British Columbia Ferry and Marine Workers' Union*, [1999] B.C.C.A.A.A. No. 385 (R.B. Blasina)).

[26] As to the confidentiality of the witnesses' statements in this case, the Ministry has provided affidavits sworn by the investigators in each investigation, both of whom depose that interviews were conducted in confidence. One of the witnesses has, in a letter to me, told me that she had been given an assurance of confidentiality. Other witnesses swore affidavits to the same effect. I conclude that the witnesses were given explicit assurances of confidentiality over information they gave to the investigators.

[27] Accordingly, I find that the manager's personal information and the applicant's personal information was "supplied in confidence" to the investigators for the purposes of s. 22(2)(f). That circumstance favours non-disclosure of the information so supplied.

Fair Determination of the Applicant's Rights

[28] In both her initial and reply submissions, the applicant refers to rules of natural justice that she says favour disclosure of the disputed information. I interpret this as an argument that the "rules of natural justice" are a relevant circumstance under s. 22(2). Considerations of this kind properly fall under s. 22(2)(c), which the applicant also addressed separately. Accordingly, I have considered her arguments on the "rules of natural justice" in conjunction with her arguments on s. 22(2)(c).

[29] In her initial submission, the applicant says she was "not permitted to review or hear the evidence/statements" made by the manager or witnesses. She says she was denied "the right to reply or rebut the statements" they made. According to her, the rules of natural justice dictate that "a person affected by an administrative decision has a right to know the case against him or her, and must be given an opportunity to reply to it". She also says information held by a decision-maker "must be made available to those affected prior to the decision being made" and that individuals "must be given the opportunity to present evidence and make an argument" to a decision-maker. The applicant says the rules of natural justice provide that "a person is entitled to a decision from an unbiased decision maker". She also says that, in order for a fair determination of her rights to have occurred, "principles of Natural Justice would need to be met", by disclosure of the case against the applicant, disclosure of information held by the decision-maker before the decision is made and by the opportunity to make evidence and make argument to a decision-maker. In her initial submission, the applicant argues that her "request to release these records" is not an unreasonable invasion of third party personal privacy "as the **Act provides for release if** the information is relevant to a fair determination of the applicant's rights" (emphasis in original).

[30] As the Ministry correctly points out, s. 22(2)(c) does not provide for release of personal information if it is relevant to a fair determination of an applicant's rights. Section 22(2)(c) merely constitutes one circumstance that may be relevant in determining whether or not personal information can be released without unreasonably invading a third party's personal privacy. Assuming, for the purposes of argument only, that the applicant's arguments accurately state the law, I am not persuaded they trigger s. 22(2)(c). The alleged deficiencies in the Ministry's investigations – about which I express no opinion – are not relevant. The reasons for this conclusion follow.

[31] In Ontario Order P-651, [1994] O.I.P.C. No. 104, the equivalent of s. 22(2)(c) was held to apply only where *all* of the following circumstances exist:

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;

2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;

3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and

4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.

[32] I agree with this formulation. I also note that, in *Greater Vancouver Mental Health Service Society* v. *British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.), at paras. 85-89, Lynn Smith J. concluded that a complainant's "fairness" concerns, related to the conduct of a complaint investigation, did not activate s. 22(2)(c).

[33] The Ministry's investigations apparently were contemplated by the collective agreement between the BCGEU and the Province. It is clear – for reasons I cannot discuss here – that the disputed information is not relevant to a fair determination of the applicant's legal rights. There is no live legal issue surrounding the investigations or their outcomes that affects the applicant's (or anyone else's) employment. Nothing said during the investigations is relevant to a determination of any of the applicant's legal "rights", related to her employment or otherwise. If the applicant had concerns about the fairness of the investigations, she should (and likely could) have done something about those concerns in the context of the investigations themselves. After-the-fact access to third party personal information under the Act is irrelevant to the fairness of those now long-closed investigations.

[34] The situation may differ, of course, where an applicant seeks information that is relevant to, and necessary for, an existing or pending arbitration or other legal proceeding in which that applicant's legal rights are being determined. An example is where an employer has refused to disclose information from an investigation that is needed by the applicant to defend herself in legal proceedings arising from, or related to, the investigation.

[35] Section 22(2)(c) is not a relevant circumstance in this case.

Unfair Exposure to Harm

[36] According to the Ministry, disclosure of the disputed information will unfairly expose the third parties to harm. The Ministry relies (at para. 4.22 of its initial submission) on *in camera* affidavits, sworn by individuals interviewed in the investigation, to argue that disclosure "could" result in the following types of harm:

- a negative impact on their working relationship with other employees, with the result that their ability to perform their employment functions may be compromised;

- result unnecessarily in the Third Parties being subject to undue stress; and

- a sense of violation on the part of the Third Parties in the event that the information they provided in confidence is released despite their objections… .

[37] The Ministry adds that "such a result would run counter to the principle of informational self-determination." It says, at para. 4.22 of its initial submission, that to expose the third parties to harm in these ways would be unfair "on the basis that they had a reasonable expectation that the information they voluntarily provided" would be "kept confidential and used only in the course of dealing with the complaint under the collective agreement." In saying this, the Ministry comes close to suggesting that, because someone has been promised confidentiality, he or she enjoys a veto over disclosure of information provided in confidence.

[38] The *in camera* affidavits sworn by three of the third parties speak to the harm issue. In my view, any "financial or other harm" is, in this case, speculative. I am not convinced by the Ministry's arguments, nor by the third parties' affidavits, that any harm within the meaning of s. 22(2)(e) would result. Section 22(2)(e) is not a relevant circumstance favouring non-disclosure in this case.

Unfair Damage to Reputation

[39] The Ministry submits that s. 22(2)(h) applies for the following reasons, found at para. 4.24 of its initial submission:

> The Public Body submits that disclosure to the Applicant of the information at issue could unfairly damage the reputations of third parties. The Public Body refers the Commissioner to the *in camera* affidavits. There is evidence that disclosure of the information at issue could result in the Applicant attempting to discredit one or more of the third parties. It is important to keep in mind the stigma that attaches **to** an allegation such as the one raised by the Applicant. Disclosure of information concerning the allegation could potentially be used in a fashion that could harm the reputation of Third Parties. The Public Body submits that any damage to the reputations of the Third Parties would be "unfair" on the basis that (1) the information was voluntarily supplied by them with the expectation that the information would be kept confidential and only used in the course of dealing with the complaint under the collective agreement and (2) the complaint has been resolved. [emphasis in original]

[40] The Ministry again places great emphasis on the confidentiality of the witness interviews. It relies on a passage from p. 8 of Order No. 70-1995, [1995] B.C.I.P.D. No. 43, in which my predecessor said that s. 22(2)(h) applied. He alluded to the need to respect investigative processes and to ensure that those involved not be subjected to "invidious attention in public that will not serve the purposes of such procedures." I agree that s. 22(2)(h) may apply in the context of an investigation, but this is not such a case. Disclosure of the information would not, on its own, unfairly damage the

reputations of others. Having reviewed the *in camera* affidavits, and the records in dispute, I am not persuaded that s. 22(2)(h) is relevant.

Amount of Information Already Disclosed

[41] The Ministry argues that a "relevant factor" for me to consider in deciding this case "is the fact that the Applicant has already been given a significant amount of information". It notes, at para. 4.32 of its initial submission, that my predecessor, in Order No. 144-1997, [1997] B.C.I.P.C.D. No. 26, "considered the fact the public body had disclosed considerable information to the applicant" and had taken the applicant's complaint seriously. In this case, the Ministry says, "enough information has been released to the Applicant to enable her to be satisfied that" the Ministry has "adequately and thoroughly investigated her complaint" (para. 4.32).

[42] I acknowledge that the Ministry disclosed a considerable amount of information to the applicant – after mediation by this Office – and I commend it for doing so. The Legislature did not, however, intend that the commissioner should, in a s. 22 matter, take into account the fact that a public body has disclosed "considerable" information (whatever that may mean) to an applicant. The commissioner's function is to determine whether a public body is required by s. 22 of the Act to refuse to disclose personal information.

[43] The Legislature did not, in my view, intend that a public body or the commissioner should, in applying s. 22, engage in a balancing of interests or levelling of the playing field. A third party's personal privacy cannot depend on diffuse notions of fairness or balance between a complainant and respondent in a workplace investigation. Nor is the amount of information disclosed to an applicant relevant in deciding whether a third party's personal privacy would, within the meaning of s. 22, be unreasonably invaded by disclosure of information still in dispute. In this case, for example, the personal privacy of the witnesses cannot depend on whether the applicant has already been given a little or a lot of information or whether or not it is 'fair' to give her more.

[44] In saying this, I am aware that, in decisions under Ontario's *Freedom of Information and Protection of Privacy Act*, the extent to which confidentiality will be afforded to witnesses and others depends on how much information has been disclosed to an applicant. An example of this is Order 37, [1989] O.I.P.C. No. 1. In that case, Commissioner Linden (as he then was) appears to have considered the amount of information that had been given to the applicant, during the complaint investigation process, in deciding whether further disclosure would unjustifiably invade the privacy of third parties. In doing so, he referred to what he described as the "balancing test" under the equivalent of s. 22(1) of the Act. My predecessor adopted a similar approach in cases similar to this one. In Order No. 194-1997, [1997] B.C.I.P.C.D. No. 55, for example, he referred (at p. 44), to his "strong sense of the utility of levelling the playing field in cases like this". See, also, Order No. 144-1997, [1997] B.C.I.P.C.D. No. 26. For the above reasons, I decline to follow the Ontario approach and that taken by my predecessor.

Nature of the Information

[45] The Ministry contends in this case that the nature of the information in issue here is a relevant circumstance. It cites Ontario Order P-1414, [1197] O.I.P.C. No. 162, and Order P-1055, [1995] O.I.P.C. No. 472, as support for the proposition that "information pertaining to an investigation into the conduct of an employee is highly sensitive" and that this "factor tips the balance in favour of protection of third party personal privacy" (para. 4.33 of its initial submission). Both of these orders dealt with requests for access to information, about an employee, that was generated during an investigation into the employee's conduct. It was held, on the facts of each case, that the disputed information was, given the context in which it was created, sensitive and that its nature as information related to an employment investigation favoured the employee's privacy. I do not read either order as even suggesting that, because personal information is generated in the course of an employment investigation, there is a presumption of non-disclosure or even a bias toward non-disclosure. Nothing in the Act supports such a contention.

[46] **3.5 Unreasonable Invasion of Personal Privacy** – As I noted above, disclosure of the remaining information is presumed to be unreasonable invasion of the manager's personal privacy because the information is subject to s. 22(3)(d). It is relevant that the information was, as contemplated by s. 22(2)(f), supplied in confidence. The applicant has not persuaded me that any other relevant circumstance favours disclosure to her of the remaining information. I find that the Ministry is required to refuse disclosure, under s. 22(1), to the manager's personal information.

[47] The third party witnesses were given assurances of confidentiality. Their identities, which are their personal information, were supplied in confidence. In the absence of any relevant circumstance favouring disclosure of their identities, I am persuaded that s. 22(1), in this case, requires the Ministry to refuse to disclose information that would directly or by accurate inference identify the third party witnesses.

[48] Last, a minor amount of the disputed information is the applicant's personal information, *i.e.*, it is recorded information about her. That information is so entwined with third party personal information, which I have found must be withheld, that it cannot be disclosed without unreasonably invading the personal privacy of the third parties, by revealing their identities. Although it is rare for an individual to be denied access to her or his own personal information, I conclude that the Ministry has established that the information must be withheld from the applicant.

[49] **3.6 Section 22(5) Summary** – Neither the applicant nor the Ministry addressed the issue of whether s. 22(5) applies to the applicant's personal information. That section requires a public body that has refused to disclose personal information provided in confidence to prepare and disclose a summary of that information. It must do so, however, only if the summary would not reveal the identity of the third party who provided the information in confidence.

[50] My predecessor outlined the process to follow in summarizing records in Order No. 286-1998, [1998] B.C.I.P.C.D. No. 81. I agree with what he said there. As my predecessor noted in that case, at p. 11, a summary of any information that has been withheld from an investigation report or interview notes

> ... should focus on providing the applicant with information from the record which is about her, without revealing the source or otherwise indirectly invading the privacy of third parties mentioned in the records.

[51] Although the applicant in this case has received the bulk of the two investigation reports, she received relatively little from interview notes (except some of the questions that were asked). However, the applicant's own information is so intertwined with that of others, in both the notes and the reports, that disclosure of her personal information would, even in summary form, identify third parties who provided information in confidence. Section 22(5) summaries must be provided in investigation cases, as in others, but it is not possible to do so here without revealing the identities of those who provided the personal information in confidence.

4.0 CONCLUSION

[52] For the reasons given above, under s. 58(2(c) of the Act, I require the Ministry to refuse access to the disputed information. Because a s. 22(5) summary cannot be prepared in this case, I need not make an order, under s. 58(3)(a), requiring the Ministry to perform its duty under that section.

February 23, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia