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

Order 02-33

BRITISH COLUMBIA PENSION CORPORATION

Charmaine Lowe, Adjudicator
July 10, 2002

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Summary: The applicant, the College & Institute Retirees Association of British Columbia, sought access to a listing of the names and addresses of members or beneficiaries of the College Pension Plan who are currently in receipt of a pension or other benefits from the Plan. Because the personal information is to be used for solicitation purposes, the presumed unreasonable invasion of personal privacy under s. 22(3)(j) applies. There being no relevant circumstances that favour disclosure, the Pension Corporation is required by s. 22(1) to refuse to disclose this third-party information.

Key Words: personal information – unreasonable invasion of personal privacy – mailing list.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(a), (c), (e) and 22(3)(j).

Authorities Considered: B.C.: Order 01-53, [2001] B.C.I.P.C.D. No. 56.

1.0 INTRODUCTION

[1] On November 8, 2001, the applicant, the College & Institute Retirees Association of British Columbia, made a request to the British Columbia Pension Corporation ("Pension Corporation"), under the *Freedom of Information and Protection of Privacy Act* ("Act"), for "a listing of the names and postal addresses of all members and/or beneficiaries of the College Pension Plan who are currently in receipt of a pension and/or

other benefits from the Plan." The applicant stated that it understood there were approximately 1,850 members of the College Pension Plan and

> … if there are any such members who have previously informed the Corporation that they do not wish their individual names and addresses to be released, their names and addresses may be excluded from the requested list.

[2] The Pension Corporation responded on November 27, 2001 by denying the applicant access to the information on the ground that disclosure of that personal information would unreasonably invade third-party personal privacy. In particular, the Pension Corporation relied on s. 22(3)(j), which presumes that disclosure of a third party's name, address or telephone number is, if it is to be used for mailing lists or solicitations, an unreasonable invasion of a third party's personal privacy.

[3] The applicant's initial submission in the inquiry provided the following background regarding the formation of the College & Institute Retirees Association of British Columbia ("CIRA/BC") and about recent changes to the College Pension Plan, in order to fully explain the purpose of its request for information. It is worth reproducing that background here at some length, noting that my doing so does not imply any findings of fact about what the applicant says:

> There are about 7,650 employed and contributing members of the Plan, and about 1,850 members are already retired and receiving a pension from the Plan. The Plan was recently found to have an actuarial surplus of some $120 million. In April, 2001, the Plan Trustees were instructed to utilize this surplus by increasing annual pensions, without an increase in contribution rates for at least five years, by about 12 per cent – but only for those employees retiring in 2002 and after. Conversely, retired members of the Plan have now received a one-time lump-sum payment of about one month's pension; that is, about 8 percent for one year only. The Trustees have therefore complied with the instructions they received in April, 2001. In some cases, the resulting difference in individual pensions, as between present and future retirees with the same length of pensionable service, is predicted to be as much as $4,000 annually for the lifetime of the pension.
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> As noted, the allocation of the surplus was essentially determined in April, 2001. However, to date, neither the Plan Trustees, nor the BC Pension Corporation, has informed current retirees of this change in the Plan. To our knowledge, the single piece of official information on this topic that has been distributed to all retirees is a "Pension Bulletin" dated October 31, 2001, which was received in the mail on about November 26, 2001 (copy attached). The sole relevant sentence in this document reads: "Part of this agreement [of April, 2001] was to improve benefits to retirees through the use of $5 million of a fund surplus". That is, neither the Trustees nor the Corporation has provided retirees with information as to the true extent of the surplus and its utilization to create a "two-tier" Plan.
>
> In a reaction to some of these events, CIRA/BC was incorporated under the Society Act on August 10, 2001. Its purpose, broadly speaking, is to guard the welfare of College retirees. To our knowledge, there is no other organization in this province with this mandate. On August 31, 2001, CIRA/BC requested the Trustees to mail a letter from CIRA/BC to all College retirees, outlining the changes to the Plan and

> asking recipients to join the new organization (copy attached). This request was refused in a letter dated October 29, 2001 (copy attached). Thus on November 8, 2001, CIRA/BC made the above request to the BC Pension Corporation; its rejection of November 27, 2001, gives rise to the present appeal.
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> I should mention that CIRA/BC has so far managed, by various means such as word of mouth, to contact upwards of 200 College retirees around the province. No one who has been contacted has objected to the contact, and the majority have in fact joined the organization.
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> In summary, the BC Pension Corporation and the Plan Trustees have failed to inform Plan retirees, in a timely manner, of important changes to the Plan of which they are members, and the Corporation has refused to provide the information which would allow CIRA/BC to inform them. The result is that the vast majority of retired Plan members do not have the information which would enable them to assess whether the April Agreement is fair and equitable – indeed, they are not even aware that an equity issue may exist.

[4] On December 10, 2001, the applicant requested a review of the Pension Corporation's decision to deny access. Because the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act. I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

2.0 ISSUE

[5] The only issue in this case is whether the Pension Corporation is required by s. 22 of the Act to refuse to disclose the requested names and addresses. Under s. 57(2) of the Act, the applicant has the burden of proving that disclosure of the information would not unreasonably invade the personal privacy of the third parties.

3.0 DISCUSSION

[6] **3.1 Preliminary Issue** – The Pension Corporation asks that I not consider any material in the applicant's reply submission that addressed s. 22(2)(e). The Pension Corporation argues that "the raising of this new issue is contrary to the rules for submissions for this Inquiry, and denies the Public Body the opportunity to make representations." In reply, the applicant argues that it is up to the Public Body "to consider whether the circumstances are exceptional" and that it is merely replying to the Pension Corporation's initial submission that no exceptional circumstances applied, by arguing that one does. The applicant also argues that, while it may not have mentioned s. 22(2)(e) in its initial submission, it alluded there to the possibility of third parties being exposed to financial harm if the applicant is not able to contact them and provide them with certain information.

[7] I have decided to consider s. 22(2)(e). I do not agree with the Pension Corporation's position that the applicant has raised a new issue. In suggesting in its

initial submission that retirees may not be receiving what is fair and equitable from the Pension Plan surplus, the applicant has clearly introduced the argument, which is expanded upon in its reply submission, that non-disclosure of the information could lead to a third party being exposed unfairly to financial harm.

[8] I note that, in any case, s. 22(2) provides that the head of a public body must, in determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, consider *all* the relevant circumstances, including whether the third party will be exposed unfairly to financial or other harm. As the Pension Corporation determined that disclosure would be an unreasonable invasion of a third party's privacy, I assume it considered s. 22(2)(e) and decided it was not relevant.

[9] It is possible that in considering s. 22(2)(e), the Pension Corporation turned its mind only to whether disclosure would expose a third party unfairly to financial or other harm as opposed to whether, as the applicant argues, non-disclosure would expose third parties to harm. However, as stated above, I am satisfied that the applicant's initial submission raised this issue and that I should consider its reply submissions on that point.

[10] **3.2 Applicable Principles** – Section 22 requires a public body to withhold personal
information where its disclosure would be an unreasonable invasion of a third party's personal privacy. Section 22(3) sets out a number of circumstances where disclosure of personal information is presumed to be an unreasonable invasion of a third party's privacy, while s. 22(2) lists some of the relevant circumstance that a public body must consider in determining whether disclosure would be an unreasonable invasion of a third party's privacy. The relevant parts of s. 22 read as follows:

> **Disclosure harmful to personal privacy**
>
> 22 (1) 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.
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> (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
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> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
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> …
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> (c) the personal information is relevant to a fair determination of the applicant's rights,
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> …
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> (e) the third party will be exposed unfairly to financial or other harm,
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> …

> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
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> …
>
> (j) the personal information consists of the third party's name, address, or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

[11] The Commissioner has discussed the application of s. 22 a number of times – see, for example, paras. 22-24 of Order 01-53, [2001] B.C.I.P.C.D. No. 56 – and I will not repeat such a discussion here. I have, however, applied the principles set out in Order 01-53 and similar decisions in this case.

[12] **3.3 Mailing Lists or Solicitations Using Personal Information** – The information in dispute is clearly third-party personal information. At the time the applicant submitted its request to the Pension Corporation, Schedule 1 of the Act defined "personal information" as "recorded information about an identifiable individual, including … the individual's name, address or telephone number ... ." The Act's definition of "personal information" has since been amended. Personal information is now defined as "recorded information about an identifiable individual", with no accompanying examples. However, in my view, the end result is the same – the names and addresses of individuals who receive benefits under the College Pension Plan are recorded information about identifiable individuals and are their "personal information".

[13] As neither party has argued that disclosure is not an unreasonable invasion of third-party privacy on the basis of s. 22(4) – and, indeed, I find that s. 22(4) does not apply – the next step in the s. 22 analysis is to decide whether disclosure of the disputed personal information is, under s. 22(3), *presumed* to cause an unreasonable invasion of privacy. The Pension Corporation argues that s. 22(3)(j) applies and relies on it to deny access to the names and addresses of the pension plan beneficiaries.

[14] The Pension Corporation denied access to the names and addresses in light of s. 22(3)(j), which provides that disclosure is presumed to be an unreasonable invasion of a third party's privacy if the personal information is to be used for mailing lists or solicitations by telephone or other means. The Pension Corporation argues that it was reasonable to presume that the information sought by the applicant would be used as a mailing list, as no other information was requested and because the applicant asked the Pension Corporation to remove from the list individuals who had previously requested that their names and addresses not be released.

[15] The applicant argues that the Pension Corporation had no evidence that the applicant intended to use the information for mailing lists or solicitations and made no effort to discover the motive for making the request before rejecting it. The applicant argues that this gives rise to a reasonable apprehension of bias on the part of the Pension Corporation. The applicant gives no further evidence to support its allegation of bias and I do not find support for it, based solely on the fact that the Pension Corporation denied

access to the information on the presumption that it would be used for a mailing list or solicitation purposes. In fact, I agree with the Pension Corporation that it was reasonable to conclude that a list of approximately 1,850 names and addresses of retirees would be used as a mailing list or for solicitation purposes by an organization representing retirees, especially when that same organization had, only two months previously, requested that the College Pension Plan Board of Trustees assist it in mailing out information to all retired members of the Plan.

[16] Despite the applicant's argument that there was no evidence on which the Pension Corporation could conclude that the applicant would use the personal information for solicitation purposes, it does admit that the Pension Corporation's "guess is broadly correct". The intention, the applicant clarifies, "is to contact (by mail or otherwise) all College pensioners, and to solicit their membership in CIRA/BC." Based on this admission alone, I have no hesitation in finding that s. 22(3)(j) applies to the requested personal information. The next step in the s. 22 analysis is to consider the relevant circumstances.

[17] **3.4 Relevant Circumstances** – As contemplated by s. 22(2), I will now consider the circumstances relevant to determining whether the Pension Corporation is required by s. 22 to refuse disclosure.

Recent changes in the College Pension Plan and the formation of CIRA/BC

[18] In providing the background information that I quoted above, the applicant appears to be arguing that its motive for contacting the third parties is a relevant circumstance. The applicant is essentially arguing that the third parties will benefit from the contact – that it has important information to provide these third parties and that they will be greatly disadvantaged by not receiving it. The applicant also believes it is relevant that, of the approximately 200 retirees contacted so far, none has objected to the contact and most have joined the organization.

[19] The applicant also raises the following grounds for rejecting the Pension Corporation's reliance on section 22(3)(j):

> The Directors and members of the CIRA/BC are themselves College pensioners, since this is a prerequisite for membership in the Association. Therefore, CIRA/BC has no intention of making repeated contact with retirees who do not respond to a preliminary letter or telephone call, and is perfectly prepared to give such an undertaking if this is required. Alternatively, CIRA/BC would accept a compromise under which the Corporation would carry out a mailing of our material to all retired members, thus avoiding disclosure of the list of pensioners.

[20] While I do not doubt the sincerity of what the applicant says, this is not enough to override the presumed unreasonable invasion of personal privacy under s. 22(3)(j). The applicant takes issue with the Pension Corporation's argument that the categories of personal information set out in s. 22(3) of the Act are intimate and sensitive in nature and, therefore, give rise to a strong expectation of privacy. Only in exceptional cases, the Pension Corporation continues, will this presumption be rebutted by factors listed in

s. 22(2) and other relevant circumstances. The applicant argues that a third party's name and address is not intimate and sensitive in nature and states that s. 22(3)(j) "should not be used to so constrain access to their names and addresses as to nullify the right of clients of BCPC [the Pension Corporation] to receive important information."

[21] The applicant misses the point. It is not the disclosure of the names and addresses alone that attracts the presumed invasion of privacy – it is the disclosure for use as a mailing list or for solicitations. Once it is shown that s. 22(3)(j) applies, it applies regardless of whether or not the purpose of the solicitation is beneficial (at least in the applicant's eyes). Although there may be a case in which the benefits to individuals of being contacted will overcome the unreasonable invasion of personal privacy created by s. 22(3)(j), this is not such a case.

[22] With respect to the applicant's other arguments, the presumed privacy impact is not eliminated because the party using the personal information for solicitations is also a pensioner or because a third party will only be contacted one time. Nor does a lack of objection by retirees contacted so far mean that others will not feel that their privacy has been invaded if the Pension Corporation provides the applicant with their names and addresses. It is one thing to find out that one's name and address were obtained through public directories or by word of mouth and quite another to learn that the Pension Corporation has, without consent, released one's name and address to an association, even if that association purports to have information which would be of interest to you.

[23] I will note here that it is not within my power to, as the applicant asks order the Pension Corporation to conduct the mail-out on the applicant's behalf, and I note from the applicant's own submission that the College Pension Board of Trustees has already rejected this suggestion.

Is disclosure desirable for subjecting the activities of the Pension Corporation to public scrutiny?

[24] The applicant argues that disclosure of the names and addresses "will allow CIRA/BC to develop public scrutiny of the activities of the Corporation and the Trustees", as it is likely the only way for the applicant to "bring these important matters to the attention of a sufficient number of the 1,850 College pensioners, and thence to the public at large."

[25] The Pension Corporation replies that all retired members of the College Pension Plan are able to hold it accountable through direct submissions to the Pension Corporation and to the College Pension Board of Trustees. Furthermore, the applicant is also free to subject the activities of the Corporation to "scrutiny through submissions to its Board of Directors, elected officials, officers of the Legislature and to raise concerns through the media, and clearly can do so without the records requested." Finally, the Pension Corporation states that there is no evidence to suggest that the applicant has been unable to locate individuals without the disputed personal information. In fact, as the Pension Corporation points out, the applicant has already managed to contact 200 members without the records. The Pension Corporation says this indicates there are

alternate ways for the applicant to subject the activities of the Pension Corporation and the College Pension Plan to public scrutiny and to seek out new CIRA/BC members.

[26] I do not agree with all of the Pension Corporation's arguments on 22(2)(a) – in particular, the argument that disclosure is not desirable because the applicant and others can hold the Corporation and Board of Trustees accountable through direct submissions. While the ability to make submissions to the Board of Trustees may be meaningful, it does not replace the right of access to information as a way of holding a public body accountable. More persuasive, in my view, is the fact that the names and addresses of retirees will not themselves subject the activities of the Pension Corporation to public scrutiny. I am not persuaded, in this case at least, that s. 22(2)(a) is relevant where the disputed information will not itself be used for subjecting public body activities to public scrutiny, *i.e.*, where the disputed information will at best be used as an instrument of disseminating information in the interests of subjecting a public body's activities to scrutiny.

[27] In fact, if I understand the applicant's submission correctly, it already has the information which, in its opinion, will subject the activities of the Pension Corporation and College Pension Board of Trustees to public scrutiny. It simply needs a method of disseminating the information (hence the request). On this point, I agree with the Pension Corporation's argument that other methods exist for disseminating the information the applicant says it has, such as the media or through the methods already employed by the applicant to contact retirees. The applicant does not explain why it cannot, with its existing membership and with the information it already has, subject the activities of the public body to public scrutiny through other means. I accept that a targeted mailing list would assist the applicant with this task but I am not convinced that the task is impossible without the list and, therefore, do not find that s. 22(2)(a) overrides the presumed privacy invasion under s. 22(3)(j).

Is the personal information relevant to a fair determination of the applicant's rights?

[28] The applicant states that disclosure of the names and addresses of retirees "is relevant to a fair determination of the rights of members of CIRA/BC and all other College pensioners." The applicant's argument is based on its contention that "recent changes in the College Pension Plan may have abridged the rights of retired members of the Plan." It argues that, as the Pension Corporation "has neglected or refused to directly inform all or most of these members of the full extent of these changes", it must be permitted the opportunity to do so. While the applicant alleges that its rights, and the rights of all other College pensioners, have been abridged, it does not explain how disclosure of the names and addresses is relevant to a fair determination of these alleged rights.

[29] In reply, the Pension Corporation states that the applicant is a society incorporated under the *Society Act* and, as such, has no entitlement to a benefit under the College Pension Plan. It argues that the applicant has no rights that are under dispute with the Pension Corporation and there is no evidence that members of the College Pension Plan

have rights that are under dispute. The Pension Corporation argues, in the alternative, that if it is determined that the applicant or its members do have rights under dispute, the dispute would rest not with it but with the College Pension Board of Trustees, the body responsible for changes made to the College Pension Plan. Finally, the Pension Corporation states that, in order for the applicant to successfully argue that s. 22(2)(c) applies, it must, in accordance with the test re-affirmed in Order 01-53, show that the right in question is a legal right, that the right is related to a proceeding which is either under way or is contemplated, that the information sought has some bearing on the determination of the right in question, and that the information is necessary in order to prepare for the proceeding. It says the applicant has not met this test.

[30] I agree with the Pension Corporation that this test, applied by the Commissioner in Order 01-53, is the one that must be applied in this case. I find, however, that it is not necessary for the purposes of this Inquiry to determine whether or not the applicant's (or anyone else's) legal rights are in dispute as a result of changes to the College Pension Plan. This is because, even if legal rights were in issue, I do not consider that the information sought would be relevant to a fair determination of those rights. As well, for the purposes of s. 22(2)(c), the alleged rights of College Pension Plan retirees whom the applicant wants to contact are irrelevant. The applicant must show that the information is relevant to a fair determination of its rights and I cannot see how disclosure of the names and addresses of others would qualify here. Certainly, the applicant cannot plausibly argue that it is applying for the third-party names and addresses as agent for those third parties, such that their rights could be in issue under s. 22(2)(c).

Will third parties be exposed unfairly to financial or other harm?

[31] The applicant says s. 22(2)(e) supports disclosure of the personal information. This is a novel argument, given that s. 22(2)(e) is generally considered to support non-disclosure. The plain language of s. 22(2)(e) shows that it applies only where a third party will be exposed unfairly to financial or other harm by disclosure of the requested information, not by non-disclosure. A review of previous orders that discuss s. 22(2)(e) supports this interpretation. I find, therefore, that s. 22(2)(e) does not support disclosure of the personal information.

[32] Since the circumstances set out in s. 22(2) are not exhaustive, and all relevant circumstances must be considered, I will consider the applicant's argument that non-disclosure of the information will expose third parties – namely the College Pension Plan retirees – unfairly to financial or other harm. If the applicant can prove that non-disclosure of the information would unfairly expose third parties to financial or other harm, then I agree that this would be a relevant circumstance that the public body should consider.

[33] Essentially, the applicant contends that the allocation of the actuarial surplus is financially disadvantageous to College Pension Plan retirees. "If this contention is correct", the applicant argues, "then a majority of College pensioners have already suffered, and will continue to suffer, financial harm."

[34] The applicant has submitted no evidence that the allocation of the College Plan surplus has abridged the rights of College pensioners or put them at a financial disadvantage. It is clear that the applicant believes that it has done so, and that the Pension Corporation has neglected to fully inform pensioners of the full details of the allocation. With respect to the alleged financial harm, the applicant estimates that, in some cases, "the resulting difference in individual pensions, between present and future retirees with the same length of pensionable service, is predicted to be as much as $4,000 annually for the lifetime of the pension." However, I only have the applicant's statement that this is the case and there is, further, no evidence that any pensioners have been exposed unfairly to financial harm as a result of not having certain information.

[35] Furthermore, even if this were the case, the pensioners, according to the applicant, have already been exposed unfairly to financial harm. It is not clear how disclosure of their names and addresses will in any way rectify this harm. Finally, I note that the Pension Bulletin – which was attached to the applicant's submission as an example of the supposedly incomplete information sent to pensioners – does mention that changes have been made to the College Pension Plan, does mention a fund surplus and does state that more information can be obtained by contacting the Pension Corporation's Pensioner Services. Therefore, even if I were to accept that the allocation of the fund surplus was financially unfair to College pensioners – and I make no comment on that – it is not clear that it is only through the disclosure of their names and addresses to the applicant that this unfairness can be rectified. The applicant has not explained why individual pensioners cannot, through their own inquiries, question the amount of the allocation. For these reasons, I find no evidence to support the applicant's contention that College pensioners will be exposed unfairly to financial or other harm, unless their names and addresses are released to the applicant.

[36] Having considered all the relevant circumstances, I find that the applicant has failed to rebut the presumed unreasonable invasion of personal privacy that applies to the disclosure of names and addresses to be used for mailing lists or solicitations.

4.0 CONCLUSION

[37] For the reasons given above, under s. 58(2)(c) of the Act, I require the Pension Corporation to refuse access to the information it has withheld under ss. 22(1) and 22(3)(j) of the Act.

July 10, 2002

ORIGINAL SIGNED BY

Charmaine Lowe
Adjudicator