



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

Order 02-45

JUSTICE INSTITUTE OF BRITISH COLUMBIA

David Loukidelis, Information and Privacy Commissioner
September 10, 2002

Quicklaw Cite: [2002] B.C.I.P.C.D. No. 45
Document URL: <http://www.oipc.bc.ca/orders/Order02-45.pdf>
Office URL: <http://www.oipc.bc.ca>
ISSN 1198-6182

Summary: The applicant requested access to records showing pass/failure and similar assessment rates of assessors in a program the Justice Institute offers. The Justice Institute is not required by s. 22(1) to refuse to disclose the assessors' names in association with the pass/failure and other information. In the circumstances of this case, disclosure of their names (their personal information) is not disclosure of employment or occupational history. Nor would it disclose the identities of individuals who have supplied confidential personal evaluations or recommendations or any individual's personal evaluations. Accordingly, no s. 22(3) presumed unreasonable invasion of personal privacy applies and there is otherwise no unreasonable invasion of personal privacy.

Key Words: personal privacy – unreasonable invasion – personal privacy – functions of a public body employee – employment history – personal recommendations or evaluations – public scrutiny.

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

Authorities Considered: B.C.: Order 00-13, [2000] B.C.I.P.C.D. No. 16; Order 00-53, [2000] B.C.I.P.C.D. No. 57; Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order 01-25, [2001] B.C.I.P.C.D. No. 26; Order 01-40, [2001] B.C.I.P.C.D. No. 41; Order 01-53, [2001] B.C.I.P.C.D. No. 56.

1.0 INTRODUCTION

[1] On December 14, 2001, the applicant made a request to the Justice Institute of British Columbia ("Justice Institute"), under the *Freedom of Information and Protection of Privacy Act* ("Act"), for access to the following:

All records “in the custody or under the control of” the Justice Institute of British Columbia relating to CR950 (the assessment component to the Conflict Resolution Certificate Program) showing:

- The pass/failure and unsatisfactory/satisfactory/strong assessment statistics for each of the assessors in the program for each of the calendar years 1997, 1998, 1999, 2000 and 2001 (to date); and
- The comparative pass/failure and unsatisfactory/satisfactory/strong assessment statistics between assessors in the program in the calendar years 1997, 1998, 1999, 2000 and 2001 (to date).

[2] On January 11, 2002, the Justice Institute responded as follows:

Before 2000, we kept no statistical records comparing assessments between assessors. However, we did discover one informal document on the computer system dated January 10, 2001, which was prepared by an employee who we are advised, at the time of preparation in order to create this document had to pull all of the individual student records and manually count the assessments and manually count and calculate percentages. The attached document dated January 10, 2001, is a summary of that task. You will note that it does not break down the records by pass, fail, unsatisfactory, satisfactory, strong, etc. as you have requested.

There was an assessor’s statistic document created for 2000 and this document is attached for your reference. Finally, there has been an assessor’s statistic document developed for 2001 up to October 15. This document is also provided.

[3] The Justice Institute’s response went on to say the following:

Please note, we have blacked out the names of the individual assessors, as we believe that disclosure of the names would contravene Section 22(3)(h) of the *Freedom of Information and Protection of Privacy Act*.

[4] The Justice Institute did not cite s. 22(3)(d) or s. 22(3)(g) in its response. By a letter dated January 14, 2001, counsel for the applicant requested a review, under Part 5 of the Act, of the Justice Institute’s decision. The matter did not settle during mediation by this Office, so a written inquiry was held under Part 5 of the Act.

2.0 ISSUE

[5] The only issue in this case is whether s. 22(1) of the Act requires the Justice Institute to refuse to disclose personal information of various assessors – *i.e.*, individuals the Justice Institute has employed or retained to assess the performance of students – because disclosure would unreasonably invade the personal privacy of the various assessors. Under s. 57(2) of the Act, the applicant has the burden of establishing that disclosure of the personal information would not unreasonably invade third-party personal privacy.

3.0 DISCUSSION

[6] **3.1 Description of the Information** – There are three pages of records in this case. As is plain from the records and other material before me, the records disclose assessments awarded by various instructors, or assessors, to students in the program identified in the applicant’s request. Students are not named in the disputed records.

[7] One page of the records is entitled “Assessor Statistics 2000”, while another is called “Assessor Statistics 2001”. The third, dated January 10, 2001, is headed “Pass rates per assessor”. The first two records each identify eight assessors by first initial and surname, while the third record identifies nine assessors by their first name only.

[8] All three records are in tabular form. The best way of describing the records is to give examples of them. To do this, I have created two charts. The first depicts a fictional Assessor Statistics chart for 2003 and the second is a fictional table showing pass rates for 2003 through 2005. The numbers in these examples do not necessarily add up. Both are identical in form to the actual records, although not as many assessors are shown below and the Assessor Statistics table for 2001 included a column and data for “Third Attempt” that space has not allowed me to mimic here:

ASSESSOR STATISTICS FOR 2003

Assessor	First Attempt	STR	SAT	FWR	Second Attempt	STR	SAT	FWR	Total of Ass'ts
A	6	3	0	5	0	0	0	0	14
B	15	5	11	3	4	0	4	0	42
C	12	5	8	3	0	0	0	0	28
D	7	0	7	0	0	0	0	0	14
Totals	40	13	26	11	4	0	4	0	98

[9] The Justice Institute has not told me what the acronyms “STR”, “SAT” or “FWR” mean. I infer from other material before me that the first two may mean, respectively, ‘strong’ and ‘satisfactory’. The Justice Institute has not given me any information about the nature of the assessments administered by the assessors or the kind of student work that was assessed.

Pass rates per Assessor			
Assessor	2002-2003 (includes med)	2004	2005
A	N/A	N/A	N/A
B	92%	85% (13)	91% (6)
C	78%	53% (8)	94% (12)
D	66%	71% (9)	98% (5)

[10] As I noted earlier, the Justice Institute has disclosed the actual tables with the names of the assessors severed.

[11] As is indicated below, the Justice Institute says, at para. 3.3 of its initial submission, that the “statistics at issue” were used to inform each assessor of her or his scoring rate “for the purposes of identifying a need for improvement.” This suggests that the Justice Institute has targets or standards of some kind in mind when it identifies a need for improvement. The disputed records themselves do not, however, contain any benchmarks or criteria as to what is expected from assessors in assessing or marking students’ performance. As the above examples indicate, there are, for example, no stated grading curves, minimum pass/fail rates or standards for how many passes or failures are expected on each try. Nor is there any evidence before me that information already available to the applicant or in the public domain could be used, in conjunction with the disputed records, to enable someone to judge or evaluate an assessor’s performance generally or against any Justice Institute standards. I return to this issue below.

[12] **3.2 Unreasonable Invasion of Personal Privacy** – I do not propose to repeat here the principles that are to be followed in applying s. 22. They have been discussed in a number of cases, including Order 01-53, [2001] B.C.I.P.C.D. No. 56. I have applied those principles here.

[13] The relevant aspects 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.
- (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
- (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,
 - (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,
 - (c) the personal information is relevant to a fair determination of the applicant’s rights,
 - (d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,
 - (e) the third party will be exposed unfairly to financial or other harm,
 - (f) the personal information has been supplied in confidence,
 - (g) the personal information is likely to be inaccurate or unreliable, and
 - (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,
- (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
- ...
- (e) 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,

[14] The Justice Institute says ss. 22(3)(d) and (h) of the Act require it to refuse access to the third-party personal information. Its arguments are succinct enough that I will reproduce them in full from its initial submission:

3.2 The Justice Institute submits that disclosure of the individual assessor's *[sic]* names would be an unreasonable invasion of a third party's personal privacy. This is a situation in which a third party has supplied a student evaluation in confidence. Disclosure of the records sought would contravene section 22(3)(h) of the *Act*.

3.3 Further, the statistics at issue were used by the Justice Institute in professional development sessions with the assessors as a group. In addition, the Justice Institute met with assessors individually. In individual meetings, each assessor was informed of his or her own individual scoring rate for the purposes of identifying a need for improvement, but was not informed of the scoring rates of the other assessors. The Justice Institute submits that the records sought are personal information relating to a third party's employment history. Disclosure of the records would be an unreasonable invasion of a third party's personal privacy under section 22(3)(d) and (g) of the *Act*.

3.4 The Justice Institute relies on Order 00-53 and Order 78-1996. Both Orders approved a public body's refusal to disclose a performance appraisal on the basis that section 22(3)(d) applied. The records sought here were utilized in a process that was akin to a performance appraisal. As such, the authorities support the position of the Justice Institute that disclosure of the records sought would contravene section 22(3)(d) of the *Act*.

[15] According to the applicant, the information that has been disclosed supports an inference that the Justice Institute has “a problem with significant discrepancies between the assessments handed out by different assessors in the program” (para. 9, initial submission). The applicant says the Justice Institute is trying to hide behind third-party personal privacy in order to avoid disclosure of these difficulties. The applicant says the assessors’ identities should be disclosed in order to promote public scrutiny of the Justice Institute’s activities, as contemplated by s. 22(2)(a). The applicant says the following at para. 10 of the applicant’s initial submission:

Far from being an “unreasonable” disclosure of information, release of grading curves for individual instructors and assessors is essential to ensure transparency on the part of the Conflict Resolution Program as well as accountability on the part of the educational facility that is responsible for ensuring a fair and consistent evaluation process for students.

[16] As the applicant notes, s. 22 of the Act prohibits disclosure of third-party personal information only if its disclosure would ‘unreasonably’ invade third-party personal privacy. As I indicated in Order 01-40, [2001] B.C.I.P.C.D. No. 41, s. 22 is intended to prevent only unreasonable invasions of personal privacy, not all invasions of personal privacy.

Functions of a public body employee

[17] In terms of the technical application of s. 22, the applicant’s first line of argument is that the disputed information is subject to s. 22(4)(e) of the Act, citing Order 00-13, [2000] B.C.I.P.C.D. No. 16, Order 00-53, [2000] B.C.I.P.C.D. No. 57, Order 01-15, [2001] B.C.I.P.C.D. No. 16, and Order 01-25, [2001] B.C.I.P.C.D. No. 26. The applicant argues that the disputed information is about the “functions” of the third parties as employees of the Justice Institute. I do not agree that s. 22(4)(e) covers the assessors’ identities when taken together with the already-disclosed statistical information. The performance statistics for students in the various assessors’ classes or courses are not “about” the assessors’ “functions” in the same way as information addressed in, for example, Order 01-15 was “about” such “functions”.

[18] I accept, as the applicant does, that the assessors’ names qualify as their personal information for the purposes of the Act. I do not, however, accept the Justice Institute’s contention that, when one associates those names with the already-disclosed statistical information, the resulting disclosure is an unreasonable invasion of personal privacy. For the following reasons, s. 22(1) does not require the Justice Institute to refuse to disclose the names of the assessors.

Confidential recommendations or evaluations

[19] The next question is whether any of the presumed unreasonable invasions of personal privacy under s. 22(3) applies. I agree with the applicant that, contrary to the Justice Institute’s contention, s. 22(3)(h) is not in play in this case. That provision is triggered only where the disclosure of information could reasonably be expected to reveal that an individual provided a confidential personal evaluation or recommendation. There

can be no argument that s. 22(3)(h) applies on the basis that disclosure would confirm that instructors assessed or evaluated unnamed students' performance, confidentially or otherwise. We already know that. Nor can it be suggested that disclosure would reveal that someone else provided confidential evaluations or recommendations respecting the assessors themselves.

Personal evaluations and similar information

[20] I also am not persuaded by the Justice Institute's argument, at para. 3.3 of its initial submission, that s. 22(3)(g) applies. I see nothing in the complete, unsevered records that would reveal "personal recommendations or evaluations, character references or personnel evaluations" of or about the assessors. The fact that the Justice Institute may, as the Justice Institute says, have used information in the tables in individual meetings with assessors "in a process akin to a performance appraisal" does not turn the information in the tables into personal recommendations or evaluations, still less character references or personnel evaluations. Use of information in the records for such a purpose does not, in this case, turn the information in the records into something mentioned in s. 22(3)(g).

Employment history

[21] Nothing in the unsevered tables reveals anything about the things one normally associates with the term "employment history", such as work history, performance reviews or evaluations, disciplinary actions taken, reasons for leaving a job, leave transactions and so on. Nor do I see any other basis on which the full set of information could, in this case, be said to relate to the employment history of individual assessors. For a given year, the information simply confirms what, in fact, happened in the specific years in each assessor's class. Using the second of the above fictional charts, it could be said that, in 2004, assessor B had a pass rate of 85% and assessor D had a pass rate of 71%. The pass/fail statistics for that year are, although generated by the marks the two instructors awarded, about that class and do not intelligibly relate to or disclose the employment history of the assessor. Nor do the 2004 data alone allow any comparison to be made between the two assessors or any judgement as to the performance of either of them. The pass/fail statistic can be a reflection on the performance of assessor B's or assessor D's class as much as anything else. Similar considerations apply to the actual Assessors Statistics records for 2000 and 2001.

[22] Nor do I consider that a comparison of pass/fail rates over the years tells one anything about the "employment history" of an assessor. It might be noted that assessor D, for example, consistently has a lower pass rate than assessor B over the years, but it is not possible to say, in terms of whether this is s. 22(3)(d) information, if this perception is good or bad or neither here nor there. Among other things, it may be that the Justice Institute likes its assessors in this program to be tough markers; or it may be it likes them not to be tough. Maybe assessor B and assessor D fall outside the norm on either side. We simply do not know and cannot tell, as no explicit or implicit norm or standard is expressed anywhere in the records that would allow such an evaluative assessment.

[23] My concerns about the Justice Institute's position are buttressed by para. 4 of its reply submission:

Finally, the Justice Institute submits that there are no policy reasons to justify disclosing such information. There may in many circumstances be no statistical correlation between the instructor's grading mechanisms and the profile of the grades across all students assessed by the instructor. The Applicant suggests in paragraph 19 that the variation in grades in and of itself suggests that the evaluation process for the Conflict Resolution Program is "seriously flawed". The Justice Institute takes exception to this unfounded statement. There may be a variety of reasons for discrepancies between grades between individual instructors. As set out in its initial submission, the Justice Institute does not normally develop such documents in any of its programs on a formal basis. Nor would it publish such documents if it did develop them on an informal basis. Particularly where statistics are not kept on an ongoing basis, and instructors change on a regular basis, it would be statistically invalid to produce such statistics and to provide them to students. There can be a variety of explanations for statistical variations within grades in any given classroom including, but not limited to, random selection of the students in any given year, the number of assessments the assessor does in any given year, how well prepared the student is, the length of time the student has taken to complete the program, the different elective choices, etc. As a result, in our submission, the argument raised by the Applicant in paragraphs 9 and 10, as a basis for overriding privacy interests of individual third parties is not statistically valid and would not "ensure transparency" or "accountability". In many circumstances it would not be appropriate to provide that information precisely because students may make an assumption that the sole reason for that discrepancy is the individual assessor.

[24] This passage confirms my view that it would not be possible to draw any useful conclusions about the assessors' employment or occupational history, as an employee or seasonal instructor, from the complete records.

[25] I do not understand the last sentence in para. 4 of the Justice Institute's reply submission to be an argument respecting the privacy interests of assessors, so much as a concern that the information may, perhaps, lead students to make choices that are not based on good information. That is not an issue with which I can deal here. If that sentence does, in fact, relate to assessors' privacy interests, I do not consider it persuasive for the reasons already given.

[26] I find that none of the presumed unreasonable invasions of personal privacy under s. 22(3) applies in this case. It is therefore not necessary for me to consider the relevant circumstances, as required by s. 22(2), in relation to any s. 22(3) presumed unreasonable invasion of personal privacy. Because the disputed information is third-party personal information, however, it is still necessary to consider relevant circumstances in determining whether s. 22(1) requires the information to be withheld because its disclosure would "unreasonably" invade personal privacy. This step is required by the opening words of s. 22(2).

Public scrutiny of the Justice Institute's activities

[27] The Justice Institute does not address this circumstance. The applicant, however, argues that “this inquiry is about requiring accountability regarding the process used, by the Conflict Resolution Program at the Justice Institute, to evaluate students in relation to the final assessment component of the program” (para. 9, initial submission). Much of the applicant’s argument in this vein follows from the contention that the differences in pass rates and other data reveal problems and serious flaws in the evaluation process, as I mentioned earlier.

[28] Students are entitled to information related to the assessment process, in the applicant’s view, including information regarding previous assessment statistics of individual assessors to whom they have been assigned. The applicant says that instructors in colleges and universities routinely post their class grades, without students’ names, “allowing students to determine the instructor’s overall grading curvature” and that revealing this information will increase confidence in the process (paras. 18-19, initial submission). The applicant does not say how confidence in the process will be increased in this way.

[29] The applicant already knows there are differences between the various assessors’ pass rates and other assessments. This is the basis on which the applicant has already concluded there are flaws in the assessment process, a contention the Justice Institute contests in the passage quoted above. It is not clear to me how knowing the assessors’ names would advance the applicant’s arguments or buttress the applicant’s conclusions based on the already-available information. I do not accept that disclosure is desirable for the purpose of subjecting the Justice Institute’s activities to public scrutiny.

Other relevant circumstances

[30] The applicant does not contend that disclosure of the assessors’ names is relevant to a fair determination of the applicant’s rights within the meaning of s. 22(2)(c), so this is not a relevant circumstance in favour of disclosure.

[31] Nothing in the material before me suggests that disclosure of the names, in conjunction with the information already given to the applicant, would unfairly expose the assessors to financial or other harm (s. 22(2)(e)) or unfairly damage their reputations (s. 22(2)(h)). These circumstances do not favour withholding the information.

[32] Nothing in the Justice Institute’s submissions suggests that the personal information was “supplied in confidence” to the Justice Institute (s. 22(2)(f)), so this does not weigh against disclosure. Nothing in the nature of the records themselves, or their contents, supports such a conclusion. Similarly, there is no basis on which I can conclude that the personal information is likely to be inaccurate or unreliable (s. 22(2)(g)), so this circumstance does not favour withholding the information.

Is the applicant entitled to the assessors' names?

[33] Again, there is no s. 22(3) presumption of an unreasonable invasion of personal privacy in this case. As the preceding discussion indicates, none of the relevant circumstances favours the conclusion that s. 22(1) requires the Justice Institute to withhold the information. There is another consideration – the nature of the information. The names of the assessors are undoubtedly their personal information, but when it comes to one's name context is important. In the absence of any presumed unreasonable invasion of personal privacy under s. 22(3), and in light of the nature of the information already disclosed to the applicant, the assessor's names are hardly sensitive personal information. Nor do I think that the complete set of information would unreasonably invade their personal privacy. Even if one assumes only for the purposes of argument, that the complete set of information is personal information of the assessors, it is hardly sensitive or stigmatizing information or information of a kind that is, by its nature, ordinarily confidential. I do not consider that disclosure of the disputed information would, in this case, be an unreasonable invasion of personal privacy under s. 22(1) and find that s. 22(1) does not require the Justice Institute to withhold the information.

[34] The outcome here turns on the facts of this case, including because no presumed unreasonable invasion of personal privacy exists under s. 22(3), since the evidence does not suggest that the complete set of information would qualify as information relating to employment or occupational history within the meaning of s. 22(3)(d).

4.0 CONCLUSION

[35] For the reasons given above, under s. 58(2)(a) of the Act, I require the Justice Institute to give the applicant access to the personal information that it withheld under s. 22.

September 10, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia