



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

Order 02-56

**ARCHITECTURAL INSTITUTE OF BRITISH COLUMBIA**

Celia Francis, Adjudicator  
November 14, 2002

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**Summary:** Applicant requested records related to his employment with the AIBC and to records related to two other employees. The AIBC withheld several records under ss. 14, 17 and 22. Section 14 found to apply to one record. Section 17 found not to apply. Section 22(4)(e) found to apply to the employees' employment contracts, job descriptions, salary and benefit information, which is ordered disclosed. Sections 22(1) and 22(3)(d) and (g) found to apply to some withheld information.

**Key Words:** solicitor client privilege – financial or economic interests – negotiating position – negotiations by or for public body – unreasonable invasion of personal privacy – information about position, functions or remuneration – employment history – public scrutiny – unfair damage to reputation.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 14, 17(1)(e), 22(1), 22(2)(a), (e), (f), (g) and (h), 22(3)(d), (f) and (g), 22(4)(e).

**Authorities Considered: B.C.:** Order No. 52-1995, [1995] B.C.I.P.C.D. No. 25; Order No. 303-1999, [1999] B.C.I.P.C.D. No. 16; Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 00-20, [2000] B.C.I.P.C.D. No. 23; Order 00-24, [2000] B.C.I.P.C.D. No. 27; Order 00-39, [2000] B.C.I.P.C.D. No. 42; Order 00-53, [2000] B.C.I.P.C.D. No. 57; Order 01-17, [2001] B.C.I.P.C.D. No. 18; Order 01-19, [2001] B.C.I.P.C.D. No. 20; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-41, [2002] B.C.I.P.C.D. No. 41; Order 02-50, [2002] B.C.I.P.C.D. No. 51.

## 1.0 INTRODUCTION

[1] This decision originates in a request listing six items that the applicant submitted under the *Freedom of Information and Protection of Privacy Act* (“Act”) on June 11, 2001

to the public body, the Architectural Institute of British Columbia (“AIBC”). The AIBC responded in stages in July and August of that year, by providing access to some records, issuing a fee estimate for providing access to others and telling the applicant that it was withholding still other records under ss. 14, 17 and 22 of the Act. The applicant then requested a review of the AIBC’s decision to deny access to records.

[2] Because the matter did not settle in mediation, a written inquiry took place under Part 5 of the Act. As the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act, I have dealt with this inquiry by making all findings of fact and law and the necessary order under s. 58.

## **2.0 ISSUES**

[3] The issues in this inquiry are whether the AIBC was authorized by ss. 14 and 17 of the Act, and required by s. 22, to refuse access to some of the records the applicant requested on June 11, 2001. For reasons I discuss below, Items 1 and 2 of the applicant’s request are not in issue at all in this inquiry. In addition, only certain records requested in Items 3-6 of this request are in issue here.

[4] Throughout his initial submission, the applicant argued that the AIBC had not fulfilled its duty under s. 6(1) of the Act to assist him. In its reply, the AIBC objected to the inclusion of this additional issue. The AIBC’s compliance with s. 6(1) was not explicitly stated as an issue in the applicant’s request for review, which addressed the refusal to provide information, nor was it listed as an issue in the Notice of Inquiry and Portfolio Officer’s Fact Report. It is therefore not properly before me in this inquiry and I have not considered it in this decision.

[5] In his initial submission, the applicant also addressed requests he had made to the AIBC in July and October, 2001. Again, the AIBC objected to the inclusion of these additional issues and said it had understood throughout both the review and inquiry processes that only the June 11, 2001 request was in issue.

[6] The Registrar of Inquiries of this Office wrote to the applicant on March 20, 2002 to inform him that the Notice of Inquiry and the Portfolio Officer’s Fact Report stated that the inquiry arose out of the June 11, 2001 request only, the AIBC’s decisions regarding his other requests were therefore not properly in issue in the inquiry and the inquiry would only deal with the June 11, 2001 request. The AIBC’s decisions regarding these later requests are not properly before me in this inquiry and I have not considered them in this decision.

## **3.0 DISCUSSION**

[7] **3.1 Background to Inquiry** – The applicant’s request of June 11, 2001 was for six items, as follows:

1. June 11, 2001 AIBC Council meeting package including attachments, background material, etc. and June 11/01 unadopted meeting minutes. This applies

to both the open session and 'in camera' session to the extent permitted/required by the FOI/POP legislation.

2. Detailed AIBC financial records for the fiscal year ends 1999 and 2000 and for the current year 2001. Statements are to include reconciliation of all expenditures by the actual name of recipients (not code names), associated payment and amount and reason for payment to the extent records are kept or can readily be produced.
3. Report by Vince Battistelli prepared in February and March of 2001 to assess the Executive Director's compliance with Management Philosophy policy set out in Sections 2.8.1 to 2.8.7 of the Governance Model, Policy 2.0 "Operational Constraints". Please include preliminary submissions as well as the final report, attachments, other supporting data or surveys (including staff survey by mail), etc.
4. All information contained in my personal employment file and notes of discussions prior to my employment relating to my employment negotiations and terms of engagement including AIBC legal counsel's opinions and notes for consideration and achievement of contract termination.
5. Employment Agreement contract (or similar document or procedures) between AIBC and the Executive Director including terms of reference, current salary, bonuses, performance review report and any other benefits or contractual arrangements affecting the employment protocol.
6. Employment Agreement contract (or similar document or procedures) between the AIBC and the Director of Professional Services including terms of reference, current salary, bonuses, performance review report and any other benefits or contractual arrangements affecting the employment protocol.

[8] The applicant requested a seventh item in a follow-up request of June 14, 2001. He did not take issue with the AIBC's response, however, stating in an e-mail message of October 14, 2001 to the AIBC that "the information provided is as requested." In the following section, I describe how the issues in this inquiry arose.

***Item 1 – Request for AIBC Council package and minutes***

[9] The AIBC sent the applicant a letter on July 4, 2001 providing records in response to Item 1 of his request. It described them as the "information package and unadopted minutes of the June 11, 2002, Council meeting." The AIBC said nothing in its response letter about withholding any information or records. The applicant appears to have interpreted the AIBC's response as indicating it was withholding *in camera* Council meeting minutes (pp. 1-2, applicant's initial submission), although it is not clear on what basis he drew this conclusion.

[10] The AIBC said in its initial submission that it responded fully to this part of the applicant's request. There was no closed session of the AIBC Council on June 11, 2002 and there are therefore no *in camera* minutes to provide, it said. It said it has twice told the applicant that it provided all requested records and does not think it necessary to address

this issue further (para. 4, initial submission; paras. 3.1-3.3, reply submission). I agree with the AIBC on this point. It has not withheld *in camera* minutes and there is no issue with respect to Item 1 of the applicant's request. I have therefore not considered it in this decision.

### ***Item 2 – Financial records***

[11] In a second letter of July 4, 2001, the AIBC told the applicant that it was charging a fee for responding to Items 2, 3 and 5-7 of his June 11, 2002 request. The applicant agreed on July 6, 2001 to pay the fee for Items 3 and 5-7 but considered the fee related to Item 2 to be excessive. The parties then engaged in discussions on the fee related to Item 2, with the applicant arguing on the one hand that it should be easy to produce the records he wanted and the AIBC on the other encouraging the applicant to narrow his request in order to decrease the fee estimate. The material before me indicates that the parties failed to reach a resolution on the fee issue and that the AIBC has not provided a final response with respect to this part of the applicant's request. There is no indication that the applicant requested a review of the fee estimate by this Office nor that he requested a fee waiver from the AIBC. Thus, any issues respecting Item 2 are not before me in this inquiry.

[12] The applicant's initial submission on Item 2 dwelt on his view that the AIBC had failed to assist him under s. 6(1) of the Act in identifying records that would meet his needs. As I noted earlier, however, s. 6(1) is not in issue in this inquiry.

### ***Item 3 – Battistelli Report***

[13] The applicant requested a report

... by Vince Battistelli prepared in February and March of 2001 to assess the Executive Director's compliance with Management Philosophy policy set out in Sections 2.8.1 to 2.8.7 of the Governance Model, Policy 2.0 "Operational Constraints" ... [including] preliminary submissions as well as the final report, attachments, other supporting data or surveys (including staff survey by mail).

[14] The AIBC told the applicant in a letter of August 13, 2001 that, under s. 22 of the Act, it was denying access to "the report and supporting documents prepared by Vince Battistelli for Council in February and March 2001 to assess the Executive Director's compliance with Philosophy of Management."

[15] In its initial submission, the AIBC said that it surmised that the records at issue respecting Item 3 were:

1. Interview notes from interviews with staff members
2. Staff surveys – written surveys by mail
3. Summary report to Council [AIBC document 1]

[16] To the AIBC's knowledge, no other records fit the description in Item 3. It confirmed that it had withheld all the records in Item 3 under s. 22 of the Act. In any case,

it argued, with the exception of the summary or final report by Vince Battistelli, it did not have custody or control of the other records and therefore the Act did not apply to them. It said that Vince Battistelli was an independent contractor and that he had used the interview notes and surveys to prepare the report for its Council. Mr. Battistelli did not share these materials with the AIBC nor did the AIBC intend him to do so as part of his contract (a copy of which it did not provide). The AIBC reiterated this position in its reply. I note that this was the first time that the AIBC raised the issue of whether it has custody or control of the interview notes and surveys. It follows that this issue is not listed in the Notice of Inquiry or Portfolio Officer's Fact Report for this inquiry.

[17] The applicant replied that his intention in asking for the supporting documents was to ensure that the AIBC included all appendices and attachments to the report:

I have not at any time implied that I was seeking the confidential comments provided to Mr. Battistelli by anyone but that if such comments were compiled into statistical or supporting data provided with [sic], or discussed with, the AIBC, that such information should be disclosed as being part of the report and reporting process. I do not wish to access Mr. Battistelli's private notes and collected surveys unless he has given access to them to someone else not covered by his firm's internal confidentiality.

[18] I can understand how the AIBC interpreted Item 3 of the applicant's request as incorporating notes of interviews with staff and surveys completed by staff. However, in the face of the applicant's explicit statement that he does not want the notes of interviews with staff, nor the surveys completed by staff, and not least because the AIBC failed to raise the custody and control issue in a timely manner, I need not consider the AIBC's arguments that it does not have custody or control of these records, nor its arguments on the application of s. 22 of the Act to them.

[19] This is not to say that I endorse the AIBC's position that it does not have custody or control of the interview notes and surveys. I do not have enough information to make a determination on that issue, even if it were properly before me, which it is not. I make no comment or finding on the AIBC's position on this issue.

[20] The only issue from Item 3, therefore, is the AIBC's application of s. 22 to the summary or final report, that is, the March 2001 report by Vince Battistelli ("Record 1"), which I address below.

#### ***Item 4 – applicant's employment file***

[21] In its response of August 13, 2001 to Item 4 of the applicant's request, the AIBC told the applicant that it had severed a small amount of information under s. 22 and had withheld correspondence with its legal counsel under s. 14. The AIBC's initial submission states that, in one document, it withheld the names of other candidates in the competition for a job within the AIBC in which the applicant was apparently successful. It provided no argument on how it considers s. 22 to apply to this information, however, nor did it provide me with a copy of the relevant record.

[22] The applicant's initial submission does not address this aspect of Item 4. In his reply, however, he says he thinks release of the other candidates' names is permitted. I took this to mean that the applicant still wishes access to the candidates' names withheld under s. 22. Given that the AIBC said that it denied access to the other candidates' names under s. 22, the applicant requested a review of the AIBC's decision to withhold information and the AIBC's application of s. 22 is listed as an issue in the Notice of Inquiry and Portfolio Officer's Fact Report for this inquiry, I decided that I must consider the AIBC's application of s. 22 to other candidates' names in this record.

[23] I therefore asked the AIBC to provide me with a copy of the record in which it had withheld the candidates' names, along with its submission on the threshold issue of how, in its view, s. 22 applies to this information. The AIBC sent me the record in question (two pages of notes) and said that it had severed not only the names of the other candidates and other identifying information, but also comments about one of the other candidates. It also provided argument on the application of ss. 22(3)(d) and (g). I then gave the applicant the opportunity to comment on the AIBC's supplementary submission, which he did.

[24] Thus, the first issue with respect to Item 4 is the AIBC's application of s. 22 to some information in this two-page record ("Record 2"). I deal with this issue later.

[25] Also respecting Item 4, in its letter of August 13, 2001, the AIBC told the applicant it was denying access to "one correspondence" with its lawyer under s. 14. The second issue with respect to Item 4 of the applicant's request therefore is the AIBC's application of s. 14 to a letter from its outside legal counsel ("Record 3") and I address it below.

[26] The applicant argued in his initial and supplementary submissions that there should be other records reflecting the AIBC's interactions with legal counsel and gave reasons for supposing this. Again, the AIBC's compliance with its s. 6(1) duty in searching for records is not in issue before me and I will not deal with the applicant's contention that there should be other records. I note, in any case, that the AIBC explained in its reply, and again in its supplementary submission, how it was not able to find any such additional records.

#### ***Item 5 – Records related to the Executive Director***

[27] In its initial submission, the AIBC described the responsive records for Item 5 as the Executive Director's:

- original employment contract;
- most current salary and benefits agreement;
- terms of reference; and
- performance review report.

[28] Although the AIBC listed the Executive Director's current salary and benefits agreement and performance review report separately, as if they were two records, it actually provided a single record ("Record 5") which combines these two things.

[29] In his initial submission, the applicant acknowledged that “performance reviews may not be available in their entirety but the performance review protocol should be available ... .” In his reply, however, he requested an order to release the records identified in Items 5 and 6 of his request. Regarding Item 5, I interpret this to mean he wishes access to the records identified in the AIBC’s initial submission as responsive to this part of the applicant’s request. I have therefore considered, below, the AIBC’s application of ss. 17 and 22 to these three records (“Records 4-6”) in this decision.

***Item 6 – Records Related to the Director of Professional Services***

[30] The AIBC described the responsive records for Item 6 as the Director of Professional Services’:

- original employment contract;
- most current salary agreement;
- performance review report; and
- terms of reference.

[31] As noted above, the applicant appeared in his initial submission to disavow any interest in the Director’s individual performance review but in his reply requested an order for the release of all records related to Item 6 of his request. As with Item 5, therefore, I interpret this to mean that he wishes access to all four records in Item 6. Accordingly, I have considered the AIBC’s application of ss. 17 and 22 to these four records (“Records 7-10”).

[32] **3.2 Records in Dispute** – For ease of reference, I describe below the records in dispute in this inquiry, together with the exceptions the AIBC applied to each.

**Record 1** – The five-page report of March 2001 prepared by Vince Battistelli (“Battistelli report”), withheld in full under s. 22. It consists of a cover page and four pages of text: an introduction; an “Abbreviated Summary of Findings”, which consists of quotes of policies 2.8.2 to 2.8.7 from the AIBC’s “Operational Constraints Policy 2.8 Philosophy of Management” and summaries of the responses or comments from staff regarding the Executive Director’s compliance with each policy; an analysis section; and recommendations.

**Record 2** – Two pages of hand-written notes released in severed form, with approximately a dozen lines withheld under s. 22. The first page appears to be an evaluation or assessment of the qualifications of two candidates for the position, one of them the applicant. The second page appears to be a draft note to the AIBC’s Council setting out the results of the job interview process in which the applicant was successful, including a list of the candidates, and recommending that the Council approve the appointment of the applicant. The AIBC withheld the name and assessment or evaluative comments about one of the other candidates on the first page and the names and other identifying information of the other candidates on the second page. Curiously, the AIBC also withheld a piece of the applicant’s own personal information.

**Record 3** – A two-page letter of February 18, 1999 (with attachments) from the AIBC’s outside legal counsel, to which the AIBC applied s. 14.

**Record 4** – The Executive Director’s August 1999 employment contract, withheld under ss. 17 and 22. This record consists of a two-page letter setting out the terms of the contract and the salary, with three pages of attachments, two pages of which constitute the Executive Director’s job description and the third of which lists the benefits accruing to the position.

**Record 5** – The Executive Director’s most current salary agreement and performance review, dated December 2001, withheld under ss. 17 and 22. This three-page record consists of a two-page letter, setting out both the performance review or evaluation information and the current salary and benefits package for the position, and a one-page attachment which is linked to the performance review.

**Record 6** – The Executive Director’s current job description (which the AIBC calls “terms of reference”), withheld under ss. 17 and 22. This record is three pages long. The first two pages appear to be identical to the two-page job description attached to Record 4 while the third page describes the “competencies and qualifications” that a “superior candidate” for the AIBC’s Executive Director would have.

**Record 7** – The Director of Professional Services’ original employment contract, withheld under ss. 17 and 22. This record is a two-page letter dated February 1992, with seven pages of attachments. The attachments consist of the Director’s 1991 employment agreement with salary and benefits information (annotated to reflect 1992 updates), his job description and a related August 1991 memorandum.

**Record 8** – The Director of Professional Services’ most current salary agreement, withheld under ss. 17 and 22. This record is a two-page letter from November 2001 with a one-page attachment. The letter is an employment agreement, similar to the Executive Director’s, which states the salary for the position, while the attachment sets out the benefits.

**Record 9** – The Director of Professional Services’ performance review or evaluation from November 2000, withheld under ss. 17 and 22. This record is ten pages long. It sets out the general goals and standards for meeting the requirements of the job and the hand-written supporting commentary or assessment of the Director’s performance against those goals and standards.

**Record 10** – The Director of Professional Services’ current job description (“terms of reference”), withheld under ss. 17 and 22. This is a four-page record.

[33] **3.3 Solicitor client privilege** – The AIBC withheld Record 3 under s. 14 of the Act. Commissioner Loukidelis has described in numerous orders the kinds of privilege that s. 14 affords. See, for example, Order 02-41, [2002] B.C.I.P.C.D. No. 41:

[30] Section 14 provides that a public body “may refuse to disclose to an applicant information that is subject to solicitor client privilege”. It is well



established that s. 14 of the Act protects both branches of privilege recognized under the common law of solicitor client privilege. The two branches of privilege are legal professional privilege (certain confidential communications between solicitor and client) and litigation privilege (certain communications that come into existence for the dominant purpose of existing or contemplated litigation). ...

[34] At paras. 85 and 90 of its initial submission, the AIBC describes Record 3 as a “February 18, 1999 letter from AIBC legal counsel” with attached documents. In withholding Record 3, it says:

87. ... The AIBC relies on legal professional privilege, which relates to confidential communications between a lawyer and client related to the seeking or giving of legal advice to the client.

[35] It reminded me of the four conditions set out at p. 11 of Order 00-08, [2000] B.C.I.P.C.D. No. 8, for information to qualify for legal professional privilege:

1. There must be a communication, whether oral or written;
2. The communication must be of a confidential character;
3. The communication must be between a client (or his agent) and a legal advisor; and
4. The communication must be directly related to the seeking, formulating, or giving of legal advice.

[36] The AIBC also provided *in camera* argument and affidavit evidence to show how, in its view, Record 3 fulfils these conditions. It argued in conclusion that the letter and attachments are subject to solicitor client privilege and it is entitled to withhold them (paras. 86-90, initial submission; Mackey affidavit).

[37] The applicant argued that he should at least be told the name of the legal counsel whose advice the AIBC sought. I note, without comment, that the AIBC’s initial and reply submissions give that information. The applicant also argued that he is entitled to receive the opinions themselves, “being severed only where the public body’s legitimate interest could be harmed”. Section 14 does not incorporate a harms test, of course. It is a class-based exception.

[38] After careful review of the AIBC’s submissions and Record 3 itself, I am satisfied that it meets the four conditions set out above and I find that s. 14 applies to it.

[39] **3.4 Harm to Financial Interests** – The applicant did not address s. 17 directly in his initial submission, although he referred to it briefly in his reply, saying that the AIBC’s arguments with respect to financial harm were not sustainable. He suggested that disclosure would in fact benefit the AIBC “by permitting debate and consideration of alternative futures” and allowing the AIBC to attract astute administrators.

[40] The AIBC relied on s. 17(1)(e) to withhold Records 4-10. This section reads as follows:

**Disclosure harmful to the financial or economic interests of a public body**

17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

...

- (e) information about negotiations carried on by or for a public body or the government of British Columbia.

***Standard of Proof***

[41] The Information and Privacy Commissioner has discussed the standard for applying s. 17 in a number of orders, for example, at p. 4 of Order 00-24, [2000] B.C.I.P.C.D. No. 27, where he said:

As I noted in Order No. 00-10, the standard of proof for harms-based exceptions is to be found in the wording of the Act. The standard in s. 17(1) is that of a reasonable expectation of harm. The harm feared under s. 17(1) must not be fanciful, imaginary or contrived. Evidence of speculative harm will not satisfy the test, but it is not necessary to establish a certainty of harm. The quality and the cogency of the evidence presented must be commensurate with a reasonable person's expectation that the disclosure of the requested information could cause the harm specified in the exception.

[42] More recently, at paras. 124-137 of Order 02-50, [2002] B.C.I.P.C.D. No. 51, the Commissioner discussed in considerable detail the standard of proof for applying s. 17(1). He concluded, at para. 137, by emphasizing the need for the public body to establish

... a clear and direct connection between the disclosure of withheld information and the harm alleged. The evidence must be detailed and convincing enough to establish specific circumstances for the contemplated harm to be reasonably expected to result from disclosure of the information.

***Interpretation of "information about negotiations"***

[43] The Commissioner has dealt with the interpretation of the phrase "information about negotiations" in previous orders. In Order 00-39, [2000] B.C.I.P.C.D. No. 42, for example, at pp. 10-11, he considered arguments from the Greater Vancouver Regional District ("GVRD") regarding the alleged harm that could reasonably be expected to flow from disclosure of records of compilations, from various sources, of salaries and benefits of various unionized and non-unionized employees. Among other things, the GVRD

argued that disclosure of the requested records would have a negative effect on future negotiations by giving the applicant, a union, an unfair advantage.

[44] The Commissioner said that information that might be collected or compiled for the purpose of negotiations, that might somehow be used in negotiations, that was the subject of collective bargaining or that, if disclosed, might affect negotiations, was not necessarily *about* negotiations. The Commissioner found that information *about* negotiations included analysis, methodology, strategy or other information about labour negotiations. He also pointed out that only the Legislature could address any perceived inequity between positions of employer and union in collective bargaining.

[45] In Order 01-17, [2001] B.C.I.P.C.D. No. 18, the Commissioner considered arguments (including *in camera* argument) that information about BC Hydro's "strategy, options, and positions" in its negotiations with its union and information about "negotiations criteria" was information *about* negotiations. The Commissioner found that BC Hydro had made specific links between the withheld information and harm to its financial interests. The Commissioner then found that, if disclosed, the information would disclose BC Hydro's negotiating position and that s. 17(1)(e) applied to this information. In the same order, the Commissioner rejected arguments that he interpreted as BC Hydro requesting that he "level the playing field", saying he had no ability to do so.

[46] I have applied the principles and interpretations outlined in paras. 51-55 above in this decision.

***Would disclosure reveal information about the AIBC's negotiations?***

[47] In the AIBC's view, the type of information a public body may withhold under s. 17(1)(e) should include salary negotiations. I reproduce below the AIBC's entire arguments on s. 17 respecting Records 4-10:

58. Salaries are the largest budget expense for any public body, but particularly significant for small regulatory bodies with correspondingly small budgets. The determination of salaries and the undermining of salary negotiations by disclosure could have a significant impact on the economic interests of a regulatory body.

59. Although employees and managers in government bodies are usually either unionized or otherwise subject to published pay scales, smaller local bodies subject to the provision of the Act must be more flexible in order to attract and retain qualified employees within the constraints of their budgets. Their strength lies in being able to adjust with the employment market. Disclosing details of salary negotiations would jeopardize the bargaining position of these smaller organizations in relation to current and future employees.

...

71. The total annual budget of the AIBC varies little from year to year, as it is primarily dependent on member fees for revenue, as evidenced in the 2001 audited financial report [AIBC document 37]. The affidavit from Carla Brown-John shows that the current year budget totals \$796,860 and staff salaries amount to 58.6% as

a percentage of the budget. The AIBC currently has a total of 13 full-time permanent staff and two part-time contract staff, split between six small, diverse departments. Of the 13 full-time employees, five are managers and eight are support staff. Although the AIBC has established salary ranges for support staff, there are no established ranges for managers. Each manager has quite diverse functions and brings different skills to their job. The skill required of a manager may change over time as the AIBC's priorities change. What all managers have in common is that their position must be remunerated at a level in keeping with a similar positions [*sic*] in the market, according to Council policy. [See AIBC document 33.]

72. It is critical that the AIBC be able to negotiate salaries in confidence, particularly managerial salaries, and have the flexibility to adjust salaries to the market level while staying within a constrained budget. Not being able to do so would harm the economic and financial interests of the AIBC greatly and could easily prejudice the Institute's ability to attract and retain talented management personnel.

[48] The AIBC supported its position with an affidavit from Carla Brown-John, Manager of Administration and Human Resources for the AIBC. She deposed that her responsibilities include assisting the Executive Director in hiring new management staff and working with senior management and the Executive Director with respect to annual salary recommendations. From its participation in a middle management and professional compensation survey in October 2001, Ms. Brown-John continued, the AIBC appears to be competitive with similar organizations. In her opinion, "by not establishing exact salary ranges and by being able to negotiate contracts in confidence, the AIBC has flexibility to adjust with the market as well as providing a flexible environment for its management staff for growth potential".

[49] The AIBC's policies state that the AIBC's compensation and benefits are not to deviate materially from nor be significantly higher than the norm in the industry, Ms. Brown-John went on. She further deposed that she assists the Executive Director in complying with the AIBC's policies by conducting an annual survey of compensation for management and support staff as part of preparing the annual budget. After obtaining the results of the survey, she concluded, she makes salary recommendations which are reviewed by the Executive Director, the Treasurer and the Council President.

[50] The applicant did not respond to the AIBC's submission on this issue in any detail, simply rejecting its arguments as not sustainable. He also suggested that "in fact such disclosure would be beneficial to the AIBC's financial future by permitting debate and consideration of alternative futures" (p. 3, reply submission).

[51] The AIBC applied s. 17(1)(e) to Records 4-10 in their entirety, apparently without considering severing as required by s. 4(2) of the Act. It did not point to any specific parts of the records (which consist primarily of narrative information related to the two employees' job duties, salaries, benefits and performance reviews), which in its view, are "about" negotiations. It is certainly not clear, on the face of the records, that any of the information in Records 4-10 is "about negotiations" in the sense that Commissioner Loukidelis has interpreted the phrase. The records would not, for example, reveal

negotiating strategies, positions, criteria or other similar information that is “about” negotiations.

[52] The AIBC also did not explain how, or if, the parties had negotiated the terms of their employment, job duties, salaries or performance reviews or evaluations in the records, although the Executive Director’s 1999 employment contract refers to its renewal as being the subject of future negotiations and there is some suggestion that changes to her contract in 2001 were the results of discussions of some sort. The 1992 letter regarding the employment contract for the Director of Professional Services also suggests that there was some discussion between him and the AIBC about appropriate updates to the agreement. However, even if some of the information in the records is the *result* of negotiations, or the parties *used* the information in the records in some way in negotiations, neither of which has been established in the evidence before me, this does not mean that the information in the records is *about* negotiations.

[53] In addition, from my reading of the AIBC’s description of its limited budget and how it develops its salary recommendations from market surveys of compensation in similar organizations, it is not clear to what extent, if any, the salary information, at least, is negotiated among the parties. On the contrary, the process by which the AIBC arrives at salary recommendations suggests that there may be little, if any, leeway for changing salaries from one year to the next. Nor is it obvious from the AIBC’s submissions and the records themselves what influence, or ability to negotiate, if any, the two employees have regarding their own performance reviews or evaluations. “Performance evaluation” does not readily conjure up “negotiations” between employer and employee as to the nature or content of the evaluation of the employee’s performance.

[54] The AIBC also did not explain how disclosure of Records 4-10 could harm current or future negotiations with anyone, if such negotiations exist. Nor is it clear from the records themselves how such harm might reasonably be expected to occur. The AIBC’s arguments that disclosure would, in some unspecified way, jeopardize its negotiations and greatly harm its financial interests amount to speculation.

[55] The AIBC’s arguments also seem to suggest that disclosure of the records would give employees or potential employees an unfair advantage in future discussions over salaries. As is clear from Commissioner Loukidelis’s orders, I am not able to rectify any such perceived inequities under s. 17(1)(e), the basis on which the AIBC has argued its case.

[56] For the reasons discussed above, I find that s. 17(1)(e) does not apply to Records 4-10.

[57] **3.5 Harm to Personal Privacy** – The AIBC applied s. 22 to Records 1, 2 and 4-10 as, in its view, disclosure would unreasonably invade the privacy of its Executive Director, its Director of Professional Services and others. Commissioner Loukidelis has considered the principles for applying s. 22 in numerous orders – see, for example, Order 01-53, [2001] B.C.I.P.C.D. No. 56. I will not repeat those principles but have applied them in this decision.

[58] 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.
- (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,  
...
  - (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,  
...
  - (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,
  - (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,  
...
- (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, ... .

***Do the records contain personal information?***

[59] The AIBC referred briefly, in para. 15 of its initial submission, to the definition of personal information as "recorded information about an identifiable individual" but did not otherwise address the issue of whether Records 1, 2 and 4-10 contain personal information. The applicant did not discuss it at all. From my own review of the records, however, I am satisfied that they contain personal information, principally of the Executive Director and the Director of Professional Services. Records 4, 5, 7 and 8 contain what appear to be home addresses of some individuals.

[60] The cover page and the introduction to Record 1 contain non-personal or general information, in my view. As I mentioned earlier, p. 2 of Record 2 contains one small item of personal information related to the applicant, which the AIBC withheld, but which he is entitled to receive.

***Position, functions and remuneration of a public body employee***

[61] In his initial and reply submissions, the applicant relied on Order No. 303-1999, [1999] B.C.I.P.C.D. No. 16, as support for his arguments that Record 1, the Battistelli report, and Records 4-10 should be disclosed. Order No. 303-1999 dealt with requests for the employment contracts of employees of the City of Cranbrook. Commissioner Flaherty found that they fell under s. 22(4)(e) and should be disclosed.

For its part, the AIBC argued that nothing in s. 22(4) applied to Record 1. It also said that it had considered the applicability of s. 22(4)(e) to Records 4-10 but rejected it. I can summarize its arguments on s. 22(4)(e) (at paras. 48, 56, 64-70 and 81, initial submission; paras. 7.5-7.8, reply submission) as follows:

- s. 22(4)(e) applies to publicly-funded public bodies, principally for accountability reasons, but not to self-governing bodies which are funded by their members,
- as long as a self-governing body has accountability mechanisms, which the AIBC says it has, disclosure of its employees' employment contracts and salaries would be an unreasonable invasion of their privacy, and
- it has a small staff and, with the general salary information already publicly available, its staff's salaries are apparent.

[62] The first difficulty with the AIBC's argument regarding Records 1 and 4-10 is that, as the Information and Privacy Commissioner has often stated, one begins the analysis of the applicability of ss. 22(1) through (4) with s. 22(4). If the information falls into one of the categories set out in s. 22(4), disclosure is not considered to be an unreasonable invasion of third party privacy and, subject to other exceptions, the public body must

disclose such information. The AIBC appears to have started by considering ss. 22(1) through (3) first.

[63] Secondly, the Act does not distinguish between public bodies which are publicly funded and those which are funded in other ways, such as by members. Section 22(4)(e) applies to the employees of all public bodies covered by the Act. The AIBC is a public body, as it acknowledges at para. 76 of its initial submission, and it cannot escape the applicability of s. 22(4)(e) because it is funded by its members. Thus, any information in Records 1 and 4-10 which is about AIBC employees' job duties or functions, remuneration (including salary and benefits) or positions falls under s. 22(4)(e). Indeed, on a plain reading of s. 22(4)(e), I find that much of the withheld information in Records 1 and 4-10 falls under that section, as follows:

**Record 1:** The quotations of the policies with which the Executive Director is to comply, the first paragraph in the analysis section (but not the evaluative information about the Executive Director).

**Record 4:** The entire record, except for the home address information.

**Record 5:** The opening and closing comments and the salary and benefits information (but not the home address information and not the performance review information about the Executive Director).

**Record 6:** The entire record.

**Record 7:** The entire record, except for the home address information.

**Record 8:** The entire record, except for the home address information.

**Record 9:** All information about standards and general goals of the position (but not the assessments, evaluative comments and related information about the Director).

**Record 10:** The entire record.

[64] All of the information which falls under s. 22(4)(e) must be disclosed.

[65] The AIBC rejected the applicability of s. 22(4)(e) to the withheld information in Record 2 (para. 2.6, supplementary submission). The applicant did not comment on this issue in his supplementary submission. I agree with the AIBC that s. 22(4)(e) does not apply to the withheld information in Record 2.

### ***Address Information***

[66] As I noted earlier, Records 4, 5, 7 and 8 contain what appear to be home addresses of some individuals. The AIBC did not specifically address this information, nor did the applicant provide any argument as to why he should receive such contact information, doubtless because he was not aware of it. This information, which is personal, does not



fall into any of the categories of information listed in s. 22(3), but I am not convinced that the applicant is entitled to receive it. Nor am I aware of any relevant circumstances favouring disclosure. In my view, this address information falls under s. 22(1) and must be withheld from the applicant. This accords with Commissioner Loukidelis's finding on this issue in Order 01-19, [2001] B.C.I.P.C.D. No. 20.

### *Employment History*

[67] The AIBC argued in its initial submission that s. 22(3)(d) applies to information that

... relates to events that transpired during the course of employment. This would include information provided by employees about the behaviour or performance of other employees ... to the extent that it records what another employee said about the individual's actions, in the course of their employment, as individuals, ... .

[68] The AIBC says that this includes summarized reports about an employee's behaviour or performance. The AIBC also argues that information in an individual's personnel file – such as contracts, agreements, salary history, terms of reference and performance review reports – falls under s. 22(3)(d). It also says that s. 22(3)(d) applies to information about an application for employment. Thus, the AIBC argues, s. 22(3)(d) applies to Record 1 (the Battistelli report), to the withheld names in Record 2 and to Records 4-10. The AIBC seems to argue that s. 22(3)(d) also applies to the evaluative comments about the other job candidate on p. 1 of Record 2 (paras. 19, 61, 73, initial submission; para. 2.1, supplementary submission). I need not consider the AIBC's s. 22(3)(d) arguments respecting the comments in Record 2 as I find below that they fall under s. 22(3)(g).

[69] The applicant did not expressly address s. 22(3)(d) in his submissions although, in his initial submission, he referred to Order No. 303-1999 as support for the argument that the Battistelli report and performance review information (Records 1, 5 and 9) should be disclosed. In his supplementary submission, respecting Record 2, he argued that the other candidates were bidding for a contract. He likened the job competition in which he and others had participated to a public tendering process. Information on the other candidates should therefore be available to the public so that the public might scrutinize the process, he argued. He also suggested that s. 22 does not apply to people's names, except where s. 22(3)(j) applies.

[70] I do not agree with the applicant's characterization of the job competition process, nor with his suggestion that people's names are not personal information. A person's name is clearly recorded information about an identifiable individual. Indeed, until the April 2002 amendments to the Act, a name was included as an example of personal information. This list is still a useful guide to determining what personal information is. I agree with the AIBC that, in this context, the names and other identifying information of the other candidates for the applicant's (now former) job in Record 2, are part of their employment or occupational history, as they relate to those individuals' applications, in the

past, for employment with the AIBC. I therefore find that the withheld names and other identifying information in Record 2 fall under s. 22(3)(d).

[71] Returning to Records 1 and 4-10, the AIBC's characterization of the other types of information to which s. 22(3)(d) applies is only partly correct. The Information and Privacy Commissioner has interpreted this section in a number of orders and has said that it includes information about a person's work history, leave transactions, disciplinary action taken, reasons for leaving a job and comments about an individual's workplace actions or behaviour in the context of a workplace complaint or discipline investigation (see, for example, Order 00-53, [2000] B.C.I.P.C.D. No. 57).

[72] Information in Records 1 and 4-10 regarding employees' contracts or agreements (including salaries) and terms of reference or job descriptions, that the AIBC argues falls under s. 22(3)(d), in fact falls under s. 22(4)(e), as I have found above, and must be disclosed. As for the performance review or evaluation information and comments about employees' workplace actions and behaviour (in Records 1, 5 and 9), while one could argue that they fall under s. 22(3)(d), I do not need to consider this issue, as I find below that this information falls under s. 22(3)(g).

#### ***Financial information***

[73] The AIBC argued that disclosure of the employment contracts and the salaries of the Executive Director and the Director of Professional Services would reveal their personal financial information as contemplated by s. 22(3)(f) (paras. 62 and 74, initial submission). In view of my finding that s. 22(4)(e) applies to this information, I need not deal with the AIBC's argument on s. 22(3)(f).

#### ***Personal recommendations or evaluations***

[74] The AIBC argued vigorously that the Battistelli report (Record 1) and the performance review information (Records 5 and 9) fall under s. 22(3)(g). The Battistelli report, it said, is clearly evaluative material of an identified person, the Executive Director, with comments on that person's performance in various areas and recommendations addressing any perceived weakness in her performance. The Battistelli report also relays events and staff's experiences in the workplace as examples of staff's evaluation of the Executive Director's performance respecting the AIBC's philosophy of management policy, the AIBC says. The performance reviews themselves also clearly fall into this category, in the AIBC's view (paras. 20-21, 26, 29, 63 and 75, initial submission).

[75] In its supplementary submission, the AIBC says that some of the withheld information in Record 2 consists of evaluative comments about one of the other candidates and therefore falls under s. 22(3)(g). The applicant dealt with the s. 22(3)(g) issue at the same time as s. 22(3)(d) and I outlined his arguments on that point above.

[76] Subject to my findings above on ss. 22(4)(e), 22(1) and 22(3)(d), and my finding that some of the information is non-personal, I agree with the AIBC that Record 2 contains an evaluation or assessment of one of the candidates for the applicant's job and that

Records 1, 5 and 9 contain assessments or evaluations of, and comments on, the work performance of the Executive Director and the Director of Professional Services. Section 22(3)(g) applies to information in these records, as follows:

**Record 1:** The evaluative comments in the findings section, the second to fifth paragraphs in the analysis section and the recommendations.

**Record 2:** The evaluative comments on the first page about one of the other job candidates.

**Record 5:** the “Employment Review” information on p. 1 and the related one-page attachment.

**Record 9:** the comments, assessments, evaluations and related information on pp. 1-10.

### *Public scrutiny*

[77] The applicant’s arguments in this area were general, relying on Order No. 303-1999. He acknowledged in his reply that performance reviews might contain subjective information on an employee’s performance but also argued that one aspect of a performance review was the objective assessment of an employee’s performance of “contractual terms of engagement”. Much of these types of information should be disclosed, he suggests, for accountability reasons.

[78] The AIBC argued that s. 22(2)(a) applies with respect to Records 1 and 4-10. It acknowledged the importance of public scrutiny but is of the view that it already ensures public accountability to the public and its members through the *Architects Act*, its Council and the policies in its Governance Model, “which requires Council to monitor the Executive Director’s performance in [a] number of key and specific policy areas”. The Battistelli report (Record 1) was an outcome of this Governance Model, it says, but the Executive Director’s performance should not have to be subjected to public scrutiny for accountability reasons. In any case, it says, the evaluation in the Battistelli report was done by AIBC staff and is therefore more of an internal evaluation of her interaction with staff than an issue of public concern.

[79] The right of taxpayers to scrutinize the way in which public bodies spend taxes does not apply to it as a member-funded self-regulatory body, it argues. If the regulatory body has accountability mechanisms in place, as the AIBC argues it has, disclosure of employees’ employment contracts and “income” is an unreasonable invasion of their privacy, the AIBC says, and an unreasonable and unnecessary “infringement on the regulatory body’s authority” to disclose such contract and “income” information (paras. 35, 37-39, 65-70 and 77-81, initial submission).

[80] The applicant rejects the AIBC’s accountability arguments at pp. 2-4 of his reply submission. The public and the AIBC’s members are not in a position to determine if the Council, and through it, the AIBC’s administration, are doing a good job if they do not have the requested information, he says. He goes on to say, at pp. 3-4 of his reply, that

... the AIBC under a contemporary, transparent, innovative management structure would benefit greatly from an open disclosure of all the issues raised. It would be able to attract like-minded, currently astute administrators prepared to show their credentials and defend their performance. Secrecy only serves those in the circle of secrecy, masking a lack of credentials, masking accountability and breeding mistrust.

[81] The applicant does not otherwise explain how disclosure of the personal information would assist in placing the AIBC's activities under public scrutiny.

[82] I have earlier determined that s. 22(4)(e) applies to much of the withheld personal information and that s. 22(1) applies to a few items. The remaining information falls under ss. 22(3)(d) and (g) and relates to the third parties' job applications and to performance evaluations and similar information. I fail to see how information related to the other candidates' application for employment would assist in placing the AIBC under public scrutiny. I am also not convinced that information relating to an assessment of an individual's candidacy for employment or performance of her or his employment duties adds anything meaningful to the public's understanding of a public body's activities, certainly not in this case. Section 22(2)(a) is not a relevant circumstance with respect to the ss. 22(3)(d) and (g) information here.

***Unfair exposure to harm and unfair damage to any person's reputation***

[83] The AIBC discusses the circumstances in ss. 22(2)(e) and (h) only with respect to Record 1, the Battistelli report. It says that this report was "designed to collect candid opinions and recollections of AIBC employees in order to assess the Executive Director's performance regarding staff and volunteer involvement and provide the Executive Director with feedback and constructive criticism if necessary". It argues that disclosure of the report would undermine the Executive Director, unfairly expose her to harm and unfairly damage her reputation (paras. 42 and 44 of its initial submission), but does not explain how these things might happen as a result of disclosure.

[84] The applicant expresses little sympathy for the AIBC's position on these points. The report should only expose the Executive Director to harm and criticism fairly, in his view, "with its consequences being brought upon oneself, through a considered, conscientious and independent review". Senior officials should expect to face criticism, he says, and the Battistelli report should be accessible even if it does reflect unfavourably on the Executive Director and other staff (pp. 3-4, reply). He does not otherwise explain how disclosure might not expose the Executive Director to unfair harm or unfairly damage her reputation. In any case, I do not agree with the applicant on these points.

[85] The evaluative comments are, as the AIBC says, simply staff's views on the Executive Director's compliance with the AIBC's philosophy of management. From my reading of the report, I do not agree with the AIBC that their disclosure would result in the harms that the AIBC foresees. I find that ss. 22(2)(e) and (h) are not relevant to Record 1.

*Supplied in confidence*

[86] The AIBC's arguments on s. 22(2)(f) at paras. 32 and 36 of its initial submission, as well as its affidavit evidence on this point, appear to be directed primarily at the notes of staff interviews and staff surveys, which are not in issue. The applicant's arguments in this area also appear to deal mainly with his confidential participation in the same interview and survey processes while still an employee of the AIBC. I note that, while Records 1, 2 and 4-10 are all stamped or annotated "confidential", it is evident that, except for Record 5, the AIBC stamped or wrote this term on the copies it provided with its submissions to this inquiry.

[87] The AIBC does suggest, however, that Vince Battistelli took the information employees provided in confidence and distilled it into his report. It says he then provided his report in confidence to the AIBC's Council in order for it to determine if the Executive Director was adhering satisfactorily to the AIBC's policies and to make any necessary recommendations. This process had to be confidential, it seems to argue, in order for the employees to be candid in their responses to questions about the Executive Director's management style. Indeed the affidavit evidence from staff supports this notion, as does the applicant's own submission. On this basis, therefore, I find that s. 22(2)(f) is a relevant circumstance regarding the information in the Battistelli report (Record 1) that falls under s. 22(3)(g) and that it favours withholding this information.

[88] Neither party mentioned s. 22(2)(f) with respect to Record 2. This does not mean that the AIBC must disclose the withheld names in Record 2, however. In my view, s. 22(2)(f) does apply to the names of the other candidates and favours withholding this information. I find support for this in Order No. 52-1995, [1995] B.C.I.P.C.D. No. 25, in which Commissioner Flaherty found that ss. 22(3)(d) and 22(2)(f) applied to the names of other unsuccessful job candidates and should not be disclosed. Section 22(2)(f) is not relevant to the s. 22(3)(g) information in Record 2, in my opinion, as it was not "supplied" but generated in the course of assessing this candidate.

[89] The AIBC argued that s. 22(2)(f) also applies to the employment contracts, salary agreements and performance reviews (Records 4-10), as the Executive Director and Director of Professional Services negotiated their salaries and employment contracts in confidence. The AIBC supported its arguments on this point with affidavits from the two employees in question (para. 82, initial submission; Barkley and Ernest affidavits). Both employees depose that they negotiated the terms of their employment and their salaries in confidence. Both further depose that they expected that these items and their performance evaluations would be kept confidential.

[90] In my view, the AIBC has failed to demonstrate how the Executive Director and Director of Professional Services *supplied* the information in Records 4-10. By their own admission, these two employees *negotiated* the terms of their employment and salaries with the AIBC – they did not *supply* them. Commissioner Loukidelis has found in numerous orders – see, for example Order 00-20, [2000] B.C.I.P.C.D. No. 23 – that information in a contract that is *negotiated* by the parties does not ordinarily meet the "supplied in confidence" test. Moreover, it is not clear how these two individuals could

have supplied their own performance evaluations. I find that s. 22(2)(f) does not apply to Records 4-10.

***Inaccurate or unreliable information***

[91] In para. 45 of its initial submission, the AIBC argued that s. 22(2)(g) was a relevant circumstance regarding Record 1 only. It said that the applicant, who participated in the staff survey about the Executive Director, was in the middle of a dispute over his contract and performance evaluation. The AIBC said it has reason to believe that “some of the more negative comments which surfaced in the summary report originated with the applicant”. It feels that it must take his participation in the survey into account when considering its validity. Whatever the merits of the AIBC’s arguments respecting the applicant’s allegedly negative remarks (on which the applicant did not comment), it has not demonstrated what, if any, information in Record 1 might be inaccurate or unreliable. Nor has it explained how such information might be inaccurate or unreliable. I find that s. 22(2)(g) is not a relevant circumstance with respect to Record 1.

**4.0 CONCLUSION**

[92] For the reasons given above, I make the following orders under s. 58 of the Act:

1. I confirm that the AIBC is required by s. 22 to withhold the information in Records 1, 2, 4, 5, 7, 8 and 9, as marked on the copies of those records that I have provided to the AIBC with its copy of this order.
2. I require the AIBC to give the applicant access to Records 6 and 10, in their entirety, and to give the applicant access to the information in Records 1, 2, 4, 5, 7, 8 and 9, as marked on the copies of those records that I have provided to the AIBC with its copy of this order.
3. I find that the AIBC is authorized by s. 14 to refuse access to Record 3 in its entirety.
4. Subject to para. 1 above, I require the AIBC to provide access to the information it withheld under s. 17(1) in Records 4-10.

November 14, 2002

**ORIGINAL SIGNED BY**

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Celia Francis  
Adjudicator