OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order 04-28

MINISTRY OF TRANSPORTATION

Bill Trott, Adjudicator
October 29, 2004

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Summary: The disclosure of notes prepared by a third party for a meeting with a Ministry official about a subdivision issue, is not an invasion of a third-party's privacy, nor does the disclosure meet the test in s. 21.

Key Words: supplied in confidence – commercial or financial information – undue financial loss or gain – competitive position – negotiating position – interfere significantly with – personal privacy – unreasonable invasion – opinions or views – fair determination of rights – unfair exposure to harm – inaccurate or unreliable personal information – unfair damage to reputation.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 21 and 22.

Authorities Considered: B.C.: Order 00-10, [2000] B.C.I.C.D. No. 11; Order 00-22, [2000] B.C.I.P.C.D. No. 25; Order 00-37, [2000] B.C.I.P.C.D. No. 47; Order 01-07, [2001] B.C.I.P.C.D. No. 56; Order 01-19, [2001] B.C.I.P.C.D. No. 20; Order 01-30, [2001] B.C.I.P.C.D. No. 31; Order 01-36, [2001] B.C.I.C.D. No. 37; Order 01-37, [2001] B.C.I.P.C.D. No. 38; Order 01-39, [2001] B.C.I.P.C.D. No. 40; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 01-54, [2001] B.C.I.P.C.D. No. 57; Order 02-23, [2002] B.C.I.P.C.D. No. 23; Order 02-50, [2002] B.C.I.C.D. No. 51; Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 03-03, [2003] B.C.I.P.C.D. No. 3; Order 03-04, [2003] B.C.I.P.C.D. No. 4; Order 03-15, [2003] B.C.I.P.C.D. No. 15; Order 03-24, [2003] B.C.I.P.C.D. No. 24.

Cases Considered: *Jill Schmidt Health Services Inc.* v. *British Columbia (Information and Privacy Commissioner),* [2001] B.C.J. No. 79, 2001 BCSC 101; *Canadian Pacific Railway* v. *British Columbia (Information and Privacy Commissioner) et al.*, [2002] B.C.J. No. 848, 2002 BCSC 603; *Lavigne* v. *Canada (Office of the Commissioner of Official Languages*), [2002] S.C.J. No. 55, 2002 SCC 53.

1.0 INTRODUCTION

[1] This inquiry arises from the applicant's request under the *Freedom of Information and Protection of Privacy Act* ("Act") to the Ministry of Transportation ("Ministry") for "copies of Memorandums [sic], the correspondence, notes, plans" in relation to a dispute about a subdivision application and in particular the widening of a road on one of the Gulf Islands. Specifically, the applicant requested access "to all notations about telephone conversations or notes about personal visits in any of the Ministry offices, or other meetings elsewhere".

[2] The Ministry gave notice under s. 23 of the Act to the third party, one of the persons with an interest in the records, and included copies of two records containing information that could potentially affect the third party's business or personal interests. The third party requested that the Ministry withhold one of the two records and provided reasons why the record should be withheld. The Ministry decided to grant the applicant partial access to the record. The record consists of four typewritten pages of notes that the third party prepared for a meeting with the Ministry, and which the third party provided to Ministry officials. There are two pages of maps attached to the notes. The Ministry severed the third party's name, address, home fax number and marital status. However, it advised the third party that it intended to disclose the rest of the record. The third party told the Ministry by email that it was not necessary to remove the identifying information from the record. Based upon the third party's position, the Ministry decided to release the entire record as, in its opinion, ss. 21 and 22 of the Act did not apply to it. The third party requested this Office to review the Ministry's decision.

[3] The Ministry provided the applicant with responsive records, other than the record in dispute. The Ministry disclosed a further responsive record during mediation.

[4] The third party requested this matter proceed to inquiry. 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 ("Commissioner") under s. 49(1) of the Act, I have dealt with this inquiry by making all findings of fact and law and any necessary order under s. 58 of the Act.

[5] This Office provided the applicant notice of this inquiry under s. 54(b) of the Act and the applicant made submissions. In addition, after this matter was delegated, this Office contacted another possibly affected third party. That individual declined to participate.

2.0 ISSUE

[6] The issues in this matter are:

a) Is the Ministry required by s. 21(1) of the Act to refuse to disclose information to the applicant?

b) Is the Ministry required by s. 22(1) of the Act to refuse to disclose information to the applicant?

[7] Section 57(3)(b) of the Act states that, at an inquiry into a decision to give an applicant access to all or part of a record containing information that relates to the third party, in the case

of information that is not personal information, it is up to the third party to prove that the applicant has no right of access to the record or part. In other words, the third party has the burden on the application of s. 21 to the third party business information in the record in dispute. Under s. 57(3)(a) the applicant has the burden of proving that the disclosure of any personal information in the record in dispute would not be an unreasonable invasion of privacy.

[8] The third party attempted to raise a section of the Act the public body did not apply. As this discretionary section is not in the notice of inquiry, the other parties made no submissions on the issue. As it was raised late in the process I am not considering this section.

3.0 DISCUSSION

[9] **3.1 Procedural Objection** – The applicant objects to the Ministry and the third party submitting argument and exhibits *in camera* (p.1, reply submission). The applicant submits it is difficult to meet the burden under s. 57(3) without access to these portions of the other parties' submissions. The Ministry explains that it is submitting material on an *in camera* basis because the disclosure of the *in camera* information would disclose the very information that is in dispute in this inquiry. I agree that the material submitted by the Ministry and the third party on an *in camera* basis is appropriately kept *in camera*.

[10] **3.2 Background** – The parties have provided me with background information to the ongoing dispute. As would be expected with a long-standing dispute about land, there are at least two versions of the history of the dispute.

[11] This is a dispute about a road and attempts by two landowners to subdivide land. The road runs across "A's" property, roughly parallel to the waterfront of one of the Gulf Islands. "B" uses the road to access their property. In the mid 1980's, "A" wished to subdivide their property. "A" did not receive the preliminary layout approval from the Ministry's approval officer. "A" asked the Court for relief from certain conditions imposed by the approval officer. In the late 1980's, the Court lifted those conditions and the subdivision proceeded.

[12] By the early 1990's, "B" wished to ensure that the road was a public road, under s. 4 of the *Highway Act*. The matter was litigated in the early to mid-1990's, with the result that the road in question was confirmed to be a public road, although it does not appear that the Court dealt with the issue of the width of a certain portion of the road. "B" became concerned about the long-term security of their property and began to investigate possibilities of subdivision of their property. In the fall of 2000, "B" submitted subdivision plans to the approval officer of the Ministry. It became clear that the width of the road running to the proposed subdivision needed to be clarified. The outstanding issue was the road width and condition.

[13] As I understand the situation, some of "A's" land may be required to widen the road or to reroute the road completely. I understand from the open portions of the submissions that the matter is proceeding using the "travelled portion" measurement of the road and there is an application for rezoning and a development variance application.

[14] **3.3 Third-Party Business Interests** – Section 21 requires a public body to refuse to disclose third party information under certain circumstances.

[15] The third party has the onus of proving that the applicant has no right of access. The third party argues that disclosure could harm their business interests. The business that the third party refers to in the open portion of their submission is the "present and future maintenance of our family property".

[16] As has been said in many orders, s. 21 creates a three-part test, each element of which must be satisfied before a public body is required to refuse disclosure of information. The Commissioner discussed the history and application of similar provisions in access to information legislation across Canada, and application of s. 21(1), in Order 03-02, [2003] B.C.I.P.C.D. No. 2. In deciding this matter, I have applied the approach taken in, for example, Order 03-02 and Order 03-15, [2003] B.C.I.P.C.D. No. 15.

Commercial or financial information

[17] The first part of the test is whether the information in dispute consists of commercial or financial information of or about the third party.

[18] Several orders have described "commercial" information as including "information about the buying or selling of goods and information pertaining to commerce."

[19] In the open portion of the third party's initial and reply submissions, the third party argues that this record was developed in the context of preparing the conditions for a successful subdivision application. The third party submits that prior to the Ministry approval of any preliminary strata application, Islands Trust approval must be obtained. Concurrent applications for rezoning and development variance to Islands Trust have been made.

[20] The Ministry, in its initial submission argues that much of the information in the record is historical, factual and already known. The Ministry submits that the "development approval process with respect to subdivision proposals is reasonably open and transparent." The Ministry acknowledges, at para. 4.12 of its open portion of its initial submission, however, that parts of the record in dispute likely meet the criteria in s. 21(1)(a).

[21] The applicant does not directly address whether the information is commercial or financial. However, the applicant states at p. 4 of the applicant's reply submission "[a]s the 'present and future maintenance of a family property' as stated by the third party … does not require a subdivision with resultant expropriation of neighbouring properties, it is clear that I am entitled to the disclosure [of the record in dispute]." I take it that the applicant is saying that the record in dispute is not business or commercial information.

[22] I have reviewed the record in dispute and agree with the Ministry that parts of the record meet the criteria as financial or commercial information under s. 21(1)(a). The record, in part, relates to the future plans and options of how to deal with the road, as well as the overall development of the property.

Supplied in confidence

[23] The second question is whether, as required by s. 21(1)(b), the information was supplied, implicitly or explicitly, in confidence. I will first deal with the issue of whether the disputed

record was "supplied" to the Ministry within the meaning of s. 21(1)(b). This matter has been considered in many orders and in two court decisions. It was, for example, considered extensively in Order 01-39, [2001] B.C.I.P.C.D. No. 40, Order 03-02, Order 03-03, [2003] B.C.I.P.C.D. No. 3, and Order 03-15. Judicial consideration of this provision is found in *Jill Schmidt Health Services Inc*. v. *British Columbia (Information and Privacy Commissioner),* [2001] B.C.J. No. 79, 2001 BCSC 101, and in *Canadian Pacific Railway* v. *British Columbia (Information and Privacy Commissioner) et al.*, [2002] B.C.J. No. 848, 2002 BCSC 603.

[24] I have reviewed the circumstances of the creation and distribution of the record in dispute. The third party states, in their initial submission, that the record was prepared for a meeting with officials of the Ministry. The third party states in their letter requesting a review that the record was distributed prior to a meeting with the Ministry. In the initial submission at p. 4, the third party also states that it was not intended that this record would become part of a Ministry file. There is no question that the record was provided to the Ministry. It is unlike the records discussed in the cases above which turn on whether the information in the record was susceptible to change, thus not supplied but negotiated. This record is simply a set of notes prepared for a possible presentation. While the meeting may have been a form of negotiation, this record does not record what happened at the meeting and was not created for that purpose. I find that the information in the record was supplied to the Ministry.

[25] However, s. 21(1)(b) requires that the information be supplied "in confidence". The Commissioner considered the issue of what constitutes "in confidence" in Order 00-37, [2000] B.C.I.P.C.D. No. 47, (at p. 11) in which he adopted the view expressed in Ontario Order P-1295 of whether there was a reasonable expectation of confidentiality on the part of the supplier of the information at the time the information was provided.

[26] In Order 01-39, the Commissioner's delegate, Nitya Iyer, adopted the above passage and added, at para. 28:

> The test is objective and the question is one of fact; evidence of the third party's subjective intentions with respect to confidentiality is not sufficient: *Re Maislin Industries Ltd. and Minister for Industry* (1984), 10 DLR (4th) 417 (F.C.T.D.); see also *Timiskaming Indian Band* v. *Canada (Minister of Indian and Northern Affairs)* (1997), 148 DLR (4th) 356 (F.C.T.D.).

[27] The third party submits, in their initial submission at p. 4, that the record was "an aide memoire to be used as a guide for a potential oral presentation; it contained personal notes for a full and frank discussion of the only agenda item where local knowledge might be helpful; it was prepared for a discussion of one agenda item that in reality never occurred." The third party states that it was "never intended to become part of [a Ministry] file." In their letter requesting a review by this office the third party describes the record as "personal notes." The third party explains that the record was "naively and unnecessarily predistributed to the [Ministry] participants." In their reply submission, the third party states that "[r]egardless of the context, it has never occurred to [identity] to explicitly mark any of [identity] government communications 'Without Prejudice' or 'Personal and Confidential'… . [I]f the [record in dispute] had not been implicitly submitted 'in confidence' then [the Ministry] would not have extended to [identity] the courtesy of this Freedom of Information process."

[28] The Ministry states in its initial submission, para. 4.13, that it is not taking the position that the third party did not provide the record in confidence to the Ministry. It says the record does not indicate such intention. Further, the third party's submission to the Ministry did not enable it to conclude that s. 21(1)(b) conditions had been met.

[29] The applicant suggests in their reply submission that much of what is in the record in dispute is already available to the applicant. The applicant has provided copies of some of the correspondence over the years involving the Ministry and this matter.

[30] The third party's submission fails with respect to whether the record was supplied in confidence. There are no external markers of "confidential" on the record, in Ministry policy or within the particular context of a subdivision application. The third party indicates that it is not their practice to mark such records as confidential. While the practice of marking the record does not guarantee that it will be treated under the Act as confidential, it is a helpful marker. The parties have not produced any Ministry policy establishing that such a record would be received in confidence. In fact, the Ministry indicates that the subdivision approval process is "reasonably open and transparent". There is no evidence that the Ministry received the record in confidence. There is no evidence that the Ministry understood, much less accepted, that this was a confidential process or that any supply of the record's contents was intended to be in confidence.

[31] In addition, I am unable to find that the third party provided this record implicitly in confidence. The third party has submitted, in their reply submission, p. 2, that if the record had not been implicitly submitted in confidence then the Ministry would not have provided s. 23 notification under the Act. The Ministry's obligation to notify third parties under s. 23 arises where the Ministry has reason to believe that a record contains information that "might" be excepted from disclosure under s. 21 or s. 22. This notice does not indicate that the Ministry had come to a conclusion on the application of s. 21 of the Act, much less that, at the critical time of supply of the record's contents, the supply was in confidence. The notice makes it clear that the Ministry had not made a decision on the application of s. 21 or s. 22, but was seeking the views of a third party. This notice cannot be taken as a confirmation of the application of s. 21 or s. 22, much less confidentiality of supply some time before the access request was made.

[32] I am unable to conclude that the record's contents were supplied to the Ministry in confidence, either explicitly or implicitly. I find that the record was not supplied in confidence. On this basis alone, s. 21(1) does not apply.

Reasonable expectation of harm or undue loss or gain

[33] The third part of the test requires there to be a reasonable expectation of harm to third-party interests as specified in s. 21(1)(c). It is not absolutely clear which portions of s. 21(1)(c) the third party is relying on, although I have considered all aspects of s. 21(1).

[34] On the issue of what standard of proof is required to establish a "reasonable expectation of harm" for s. 21(1) purposes, in Order 03-04, [2003] B.C.I.C.D. No. 4, at para. 35, the Commissioner stated that he applied the reasoning in Order 02-50, [2002] B.C.I.C.D. No. 51, at paras. 111-112 and 124-137 to the s. 21 harm issue. In Order 02-50, at para. 112, the Commissioner said that "the reasonable expectation of harm test requires 'a clear and direct

connection between the disclosure of specific information and the injury that is alleged': *Lavigne* v. *Canada (Office of the Commissioner of Official Languages*), [2002] S.C.J. No. 55, 2002 SCC 53, at para. 58 (Q.L.)." In Order 02-50 the Commissioner assessed the Ministry's harm claim, at para. 137:

> … by considering whether there is a confident, objective basis for concluding that disclosure of the disputed information could reasonably be expected to harm British Columbia's financial or economic interests. General, speculative or subjective evidence is not adequate to establish that disclosure could reasonably be expected to result in harm under s. 17(1). That exception must be applied on the basis of real grounds that are connected to the specific case. This means establishing 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.

[35] I have applied this approach to assessing harm in this case.

[36] In Order 00-10, [2000] B.C.I.C.D. No. 11, the Commissioner considered the meaning of "harm significantly" in s. 21(1)(c)(i). He stated, on p. 11:

> [b]y adding the word 'significantly' in s. 21(1)(c)(i), the Legislature clearly indicated that something more than 'harm' is needed. As is discussed below, by choosing a standard of significant harm, the Legislature clearly contemplated situations where disclosure could simply harm the interests of a private business, but still be permitted…. At the very least, the party bearing the burden of proof must prove that the anticipated harm is, when looked at in light of the circumstances affecting the third party's competitive position or negotiating position, a material harm to that party's competitive position. Among other things, in determining whether a feared harm is "significant", the extent of the harm in relation to the assets or revenues of the third party may be relevant.

[37] In the open portion of their initial submission, the third party at p. 4 states that an application had been submitted, at considerable expense, to Islands Trust:

> …with a strata road design that is accessed from a s. 4 [of the Highways Act] 'travelled portion only' public road. The Islands Trust application process is multi-stepped with many opportunities for community input…. Delay caused by debate of outdated and irrelevant issues could be very harmful to our business. We need to make our property development decisions very soon.

[38] This Islands Trust approval is a necessary prerequisite for Ministry approval of its preliminary strata application. The third party contends that the local Islands Trust's responsibility is to mediate the negotiations between the public and land use applicants.

[39] The Ministry, in its initial submission at para. 4.10, states that, after its review of the third party's submissions to the Ministry on the application of s. 21, it was unable to conclude that s. 21(1)(c) harms applied to the record. The Ministry points out its approval process is "reasonably open and transparent". It also states that only it can acquire rights of way or expropriate rural properties such as the one in question. In addition, the Ministry states that much of the content of the record in dispute has already been disclosed through other Ministry records.

[40] The applicant does not address this issue in their submissions other than to say generally that their request for the record was to prevent harm to the waterfront adjacent to the road. The applicant submits a number of attachments to illustrate their case that the real issue is the attempt to expropriate a portion of the adjacent property.

[41] I have reviewed the third party's submissions, both open and *in camera*, and find they fall short of the s. 21(1)(c)(i) requirements. The road and land issues have been outstanding in one way or another for over 15 years. Subdivision has been considered since the late 1990s. The third party has not shown how the possible delay the third party alleges could reasonably be expected to harm, much less "significantly", the third party's competitive position or negotiating position. The third party has not established sufficiently detailed and convincing evidence that their professed concern about delay can be reasonably expected to flow from the disclosure of the information in the record in dispute.

[42] The Commissioner has also considered the meaning of "undue", in s. 21(1)(c)(iii), in several cases. In Order 00-10 he stated, at p. 16 , "[t]he ordinary meanings of the word 'undue' include something that is unwarranted, inappropriate or improper. They can also include something that is excessive or disproportionate, or something that exceeds propriety or fitness." In Order 00-10, Order 00-22, [2000] B.C.I.P.C.D. No. 25, and Order 01-36, [2001] B.C.I.P.C.D. No. 37, at para. 57, the Commissioner stated "that which is 'undue' generally speaking can only be measured against that which is due, with some guidance being available from previous cases." In Order 00-10 the Commissioner mentioned the Ontario approach "if disclosure would give a competitor an advantage, usually by acquiring competitively valuable information, effectively for nothing, the gain to the competitor will be undue."

[43] There is reference in the material to possible gain or loss by certain parties. As this is provided *in camera* (third party initial submission, p. 4, and the Ministry's initial submission, para. 4.07), I am limited in what I can discuss in these reasons. The applicant's reply submission, pp. 3 to 4 suggests possible loss as a result of the development. I have considered the material submitted by the parties on this issue and I do not find that there is sufficient evidence to show the necessary link between the disclosure of this record and financial gain for one landowner or loss to another landowner, much less "undue" loss or gain.

[44] I find that s. 21(1) does not apply to the disputed information.

[45] **3.4 Third-Party Personal Privacy** – The third party has also raised s. 22 of the Act, which requires a public body to refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's privacy. The Ministry takes the position that s. 22 does not apply. The applicant argues that that the record does not contain personal information. The relevant portions of s. 22 follow below:

> **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
>
> …
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
>
> …
>
> (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.

[46] In its initial decision, the Ministry decided to grant the applicant partial access to the record in dispute. The Ministry states that it took into consideration a letter from the third party requesting that the entire record not be released. The Ministry states, in para. 1.09 of its initial submission (and para. 8 of the attached affidavit of Linda Wardell, Information and Privacy Analyst) that it decided not to release the name, address, home fax number and marital status of the author of the record. The Ministry states, in its initial submission at para. 1.11, that the third party in an email informed the Ministry it was not necessary to remove this personal information from the record. The Ministry has not produced a copy of this email, but has produced the Wardell affidavit, para. 9, as evidence on this point.

[47] The Ministry states "[o]n the basis of the third party's assertion that it was not necessary to remove the Severed Information from the Record and the fact that the Ministry was unable to conclude that sections 21 or 22 applied to the remainder of the Record, the Ministry decided to release the Record in its entirety".

[48] The third party requested a review of the Ministry's decision. In their reply submission, at p. 2, the third party explains their decision to allow the Ministry to release the identity of the author:

> The letter [a record not in dispute in this inquiry] was a logical step in terms of personal advocacy and therefore I was comfortable with my authorship. Furthermore, as the applicant had specified a list of authors, simple deduction from the content of the letter would have identified the author as…. [T]he specific author would have been irrelevant as each was speaking for all. Considering my request for nondisclosure of the [record in dispute], it seemed unnecessarily obstructive to not release … name etc. for this undisputed document [the letter].

[49] However, I take it that the third party through their request for review has withdrawn their agreement to the release of the identity of the author of the record in dispute. Therefore, I will review the entire record for the application of s. 22.

[50] In Order 01-53, [2001] B.C.I.P.C.D. No. 56 (paras. 22, 23 and 24), the Commissioner affirmed the approach for the application of s. 22, which I will follow in this case.

[51] The first step in the analysis is to identify the respective personal information of the applicant and the third party. As the Ministry points out, while the definition of personal information in Schedule 1 of the Act changed in 2002, in Order 02-23, [2002] B.C.I.P.C.D. No. 23, the Commissioner stated that the former list of some types of personal information remained useful to identify personal information. This list included "an individual's personal views or opinions". Where the views are about another individual, the information is considered the other individual's personal information.

[52] The information in dispute includes the identity of the author or authors of the record in dispute. The third party is concerned that because of the specific nature of the information in the record, disclosure would identify the author or authors.

Applicant's Personal Information

[53] While a name and other identifying information of an author is the author's personal information, the record also mentions some personal information identifying the applicant, which would be the applicant's personal information. Portions of the record in dispute contain the author's or authors' personal views and opinions about the applicant. The author's or authors' views about the applicant are the applicant's personal information. In Order 01-53 and Order 03-24, [2003] B.C.I.P.C.D. No. 24, at paras. 54-55 the Commissioner acknowledged that an applicant would rarely be denied access to her or his own personal information. While s. 57(3)(a) establishes the burden where the disclosure of personal information would be an unreasonable invasion of the third party's privacy, in the case of the applicant's own personal information, s. 57(3)(b) sets the burden in any other case on the third party to prove the applicant has no right of access to the record or part.

[54] Some of this information simply identifies the applicant, while some offers views about the applicant.

[55] I turn to the consideration of whether the release of the author's or authors' personal information, including the identity would constitute the unreasonable invasion of a third party's privacy. Section 57(3)(a) makes it clear in these circumstances it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

[56] However, the critical issue is whether the disclosure of the information would constitute an unreasonable invasion of the third party's privacy. The Ministry and the applicant state that, in their opinion, the disclosure of the personal information would not be an unreasonable invasion of privacy. The Ministry did not identify any grounds under s. 22(4) which would require the disclosure of the personal information, nor did it find any circumstance listed in s. 22(2) to be applicable. Nor can I find any portion of s. 22(3) or (4) which might apply. The third party submits that there are relevant circumstances under s. 22(2) which favour the withholding of the record.

Relevant Circumstances

[57] The Ministry argues some of the information in the record constitutes the third party's personal views or opinions, but the disclosure of those views would not constitute an unreasonable invasion of the third party's privacy.

[58] The applicant, in their initial submission, at p. 1, states the record is a

> … summary of facts and the one sided preparation of a consultation with the [public body]…the [record in dispute] served not only as personal notes to the writer… but in contrast it was meant and used obviously as a preparatory document for all participants for the easier reference during the meeting.…I am certain that the document does not only deal with personal and private matters of [a party], but also with the actions to be taken, the consequences of which will be affecting … property….

[59] In the reply submission, the applicant provides detail about the dispute. I have not repeated that detail, as it does not assist in the determination of s. 22. The applicant states in their reply submission, at p. 3 that the request for the record in dispute is "not about invasion of their privacy, but to prevent the intended severe damages to the [property]." I take it that the applicant is arguing that the record in dispute is needed to protect the applicant's legal rights. Section 22(2)(c) states that a relevant consideration is whether the information is relevant to a fair determination of rights. The applicant is concerned in the reply submission about the possible expropriation of property to widen the road. The applicant states if expropriation is not possible, the Province may acquire the property for the road. The applicant requests the information for the purpose of a submission to a subdivision or development process. The Commissioner has discussed s. 22(2)(c) in Order 01-07, [2001] B.C.I.P.C.D. No. 56, at paras. 31-32:

> In Ontario Order P-651, [1994] O.I.P.C. No. 104, the equivalent of s. 22(2)(c) was held to apply only where *all* of the following circumstances exist:
>
> 1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
>
> 2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
>
> 3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
>
> 4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.
>
> I agree with this formulation. I also note that, in *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.), at paras. 85-89, Lynn Smith J. concluded that a complainant's "fairness" concerns, related to the conduct of a complaint investigation, did not activate s. 22(2)(c).

[60] The circumstances surrounding the properties and the road have resulted in two separate court actions over the past 15 years. This record was provided to the Ministry within the context

of attempts by one landowner to obtain permission to subdivide either through a subdivision process or other approvals. Clearly the results of a subdivision application would have consequences, indeed legal consequences for the adjacent property owner. However, I am unable to find that the record in dispute would have bearing on the legal rights or significance for the determination of either the subdivision process or any legal action that may be contemplated. I find that s. 22(2)(c) is not relevant.

[61] In their initial submission at p. 4 the third party submits these are "personal notes for a full and frank discussion of the only agenda item where local knowledge might be helpful. The third party raises specifically s. 22(2)(e) that the third party will be exposed unfairly to financial or other harm.

[62] The third party argues, as they did under s. 21(1)(c) that, if the personal information is disclosed, they will be exposed unfairly to financial or other harm and therefore s. 22(2)(e) is a relevant circumstance. The third party anticipates delay as a result of the disclosure of the information. The third party states this delay may cause financial harm. I find that the third party has not shown that they will be exposed unfairly to financial harm.

[63] However, s. 22(2)(e) includes the phrase "other harm". The Commissioner has considered the meaning of harm and stated in Order 01-37, [2001] B.C.I.P.C.D. No. 38, and earlier in Order 01-19, [2001] B.C.I.P.C.D. No. 20, that "'harm' for the purpose of s. 22(2)(e) consists of serious mental distress or anguish or harassment…It is the exposure to harm, not the likelihood of harm that matters." In Order 01-19 at para. 34, the Commissioner distinguished upset from harm: "[e]ven if the WCB is correct in suggesting that they would be upset, however, the equation of upset with "harm" threatens to trivialize the concept of harm." I have considered *in camera* statements and find that the third party has provided sufficient explanation that s. 22(2)(e) is a relevant consideration here.

[64] The third party states the personal information has been supplied in confidence and therefore s. 22(2)(f) is a relevant circumstance. The third party states that the release of the record would reveal the identity of the author. The question of revealing the identity of a third party has been the subject of several orders. The Commissioner has found that in Order 01-54, [2001] B.C.I.P.C.D. No. 57, that a school district was required to withhold the author(s) of letters written about the applicant. These cases depend upon an examination of whether the identity is supplied in confidence. For the reasons discussed above in s. 21(1)(b), I find in these circumstances the information was not supplied in confidence.

[65] In my review of further *in camera* statements in the third party's submission, I have considered whether ss. 22(2)(g) or (h) applies. The Commissioner considered s. 22(2)(g) in Order 01-19 at para. 42:

> [Section 22(2)(g)] is aimed at preventing harm to individuals that can flow from the disclosure of inaccurate or unreliable information about them. For example, a public body's records may contain unfounded rumours about someone, the disclosure of which could embarrass that individual. The focus is on whether personal information of that individual is inaccurate, not whether the WCB's evidence respecting an accident is accurate or reliable.

[66] The record contains a series of statements of facts and some points of view. It is obviously written to persuade others to the author's point of view. However, I am unable to find that the personal information is likely to be inaccurate or unreliable. I find that s. 22(2)(g) is not a relevant circumstance.

[67] Nor am I able to find that the disclosure of this record may unfairly damage the reputation of any person referred to in the record requested by the applicant. I find s. 22(2)(h) is not a relevant consideration.

[68] The Ministry, at para. 4.10 of its initial submission, argues that "[m]uch of the information in the Record is historical, factual and already known to the applicant." I agree with this description. It is significant that a great deal of the information in the record is already known by the applicant. In Order 03-24, at paras. 66 and 68, the Commissioner found that an applicant's knowledge of certain aspects of a health regulatory investigation of a complaint made by the applicant about a third party, was a relevant circumstance in considering the application of s. 22(1) (see also Order 01-53, at para. 80). Recently, Adjudicator Celia Francis found in Order 04-04, [2004] B.C.I.P.C.D. No. 4, at paras. 47-48, that the applicant's awareness of the third party personal information was a relevant factor. In this case, it is clear from the material presented by the parties and the *in camera* submissions by the Ministry (initial submission paras. 4.01 to 4.09; a portion of para. 4.10; and reply submission para. 2) that the applicant has a great deal of knowledge of the circumstances and personal information in the record.

[69] To summarize, some of the personal information is the applicant's own personal information. I find the applicant is entitled to have access to those portions of the record. In addition, I find there are two relevant circumstances in this matter—s. 22(2)(e) and the applicant's awareness of the information in the record. In this case, given the applicant's extensive knowledge of the information in the record, I find that this relevant circumstance favours disclosure of the record. I am aware that in Order 01-30, [2001] B.C.I.P.C.D. No. 31, the Commissioner at para. 19 found that the fact that the applicant was aware of certain information did not negate the other relevant circumstance. However, in this case, I find that the applicant has met the burden under s. 57(3)(a).

4.0 CONCLUSION

[70] For reasons given above, I find that ss. 21 and 22 do not require the Ministry to refuse to disclose the information in dispute. Under s. 58 of the Act, I require the Ministry to give the applicant access to that information.

October 29, 2004

ORIGINAL SIGNED BY

Bill Trott
Adjudicator