Order F05-02

THE BOARD OF SCHOOL TRUSTEES OF SCHOOL DISTRICT NO. 68 (NANAIMO-LADYSMITH)

Celia Francis, Adjudicator
January 14, 2005

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Summary: Applicant requested access to two reports of investigations into complaints the applicant made about her children's teacher and about bullying of her children by other students. Section 22 requires the School District to refuse to disclose some, but not all, personal information in the reports. Section 21 is not applicable.

Key Words: personal privacy – unreasonable invasion – workplace investigation – opinions or views – submitted in confidence – employment history – personal or personnel evaluations – public scrutiny – fair determination of rights – unfair exposure to harm – inaccurate or unreliable personal information – unfair damage to reputation – labour relations information – supplied in confidence – similar information no longer supplied – report of labour relations officer.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 21(1)(a)(ii), (b) and (c)(ii) and (iv), 22(1), 22(2)(a), (b), (e), (f), (g) and (h), 22(3)(b), (d) and (g), 22(4)(e); s. 3, *Freedom of Information and Protection of Privacy Regulation*, B.C. Reg. 323/93.

Authorities Considered: B.C.: Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 01-07, [2001] B.C.I.P.C.D. No. 7; Order 03-34, [2003] B.C.I.P.C.D. No. 34; Order 00-53, [2000] B.C.I.P.C.D. No. 57; Order 01-54, [2001] B.C.I.P.C.D. No. 57; Order 03-24, [2003] B.C.I.P.C.D. No. 24; Order 02-56, [2002] B.C.I.P.C.D. No. 58; Order No. 62-1995, [1995], B.C.I.P.C.D. No. 35; Order 01-52, [2001] B.C.I.P.C.D. No. 55; Order 02-20, [2002] B.C.I.P.C.D. No. 20; Adjudication Order No. 2, June 19, 1997 (Bauman J.). **Ont.:** Order P-653, [1994] O.I.P.C. 108; Order PO-1721, [1999] O.I.P.C. No. 144; Order PO-2211, [2003] O.I.P.C. No. 257.

Cases Considered: *Architectural Institute of British Columbia* v. *British Columbia (Information and Privacy Commissioner)*, [2004] B.C.J. No. 465 (S.C.); *British Columbia (Minister of Water, Land and Air Protection)* v. *British Columbia (Information and Privacy Commissioner)* (2004) 26 B.C.L.R. (4th) 1 (C.A.); *Ontario (Minister of Health and Long-Term Care)* v. *Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

1.0 INTRODUCTION

[1] During the 2001-2002 school year, the applicant's daughters, who attended a school in School District No. 68 ("School District"), complained to their mother (the applicant in this case) about a series of incidents that they said had occurred at school involving a teacher and other students. The applicant complained to the school on her daughters' behalf and also attempted to resolve her concerns in discussions with School District officials. The School District arranged for two investigations of the applicant's complaints, one into specific allegations and complaints involving the teacher, and one regarding more general concerns about harassment and bullying within the school and the School District's response to allegations in that regard.

[2] The applicant asked, under the *Freedom of Information and Protection of Privacy Act* ("Act"), for full copies of the two reports that resulted from these investigations, adding,

> if you need to block out names that would be fine. My main concern in this matter is what is going to happen to [the teacher].

[3] The School District recognized that there was personal information of the applicant and her daughter, the teacher and other students in the two reports. It took steps to anonymize and sever the reports with respect to personal information of other students (unless that information had been provided by the applicant or her daughters) and to consult with the teacher as a third party. The Nanaimo District Teachers' Association ("NDTA") informed the School District that it would act on behalf of the teacher in that regard. The School District sent third-party notice under s. 23 to the teacher, through the NDTA. The notice enclosed the two reports with proposed severing under s. 22 and explained that,

> School District 68 believes that the remarks attributable to the parent and child are their own personal information under the *Freedom of Information and Protection of Privacy Act*. As such the parent is entitled to see those portions of the reports that reflect the parent's and children's comments about the teacher.
>
> In addition, we believe there are other sections of the reports that are not the personal information of the teacher. Attached is a copy of the report that I have severed, to show you what the school district plans to release to the requester.

[4] The teacher objected that the severing proposed by the School District under s. 22 was inadequate to protect the teacher's personal privacy, stating as follows in a letter:

> We believe there are sections in the severed documents which are clearly identifiable as being about the teacher which we would see as inappropriate.
>
> The release of these reports in response to this request would be an invasion of the teacher's privacy.

[5] The School District gave notice of its decision to disclose the reports in severed form for the following reasons:

> We have carefully considered the NDTA's objections, on behalf of the teacher, to the release of the information, but have concluded that the severed version of the reports that the district proposes to release, are clearly the personal information of the applicant and the applicant's children, as defined by the *Act*. Some other sections of the report that will be released, while not the personal information of the applicant, are also not the personal information of the teacher and, therefore, cannot be withheld.

[6] The teacher requested a review of the School District's decision by this Office, on the ground that the reports contain personal and employment information about the teacher.

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

2.0 ISSUES

[8] The notice of inquiry stated one issue: whether the School District is required by s. 22 of the Act to withhold personal information in the two reports.

[9] Section 57(3)(a) provides that at an inquiry into a decision to give an applicant access to all or part of a record containing personal information relating to a third party, it is up to the applicant to prove that disclosure would not be an unreasonable invasion of the third party's personal privacy.

3.0 DISCUSSION

[10] **3.1 The teacher's submission** – The teacher's submissions in the inquiry were made through counsel, who claimed to represent the British Columbia Teachers' Federation ("BCTF") and the NDTA, making submissions on behalf of their member, the teacher, and on their own behalf.

[11] The BCTF and NDTA do not acquire interests under the Act in respect of information in the requested reports by tendering submissions on behalf of the teacher and claiming that the submissions are also made on behalf of the BCTF and NDTA. For example, the issue in this inquiry about whether s. 22 requires the School District to withhold personal information in the two reports concerns the interests of identifiable individuals, not the BCTF or the NDTA. These organizations may, or may not, agree with or support the perspective of an individual who is one of their members (in this case the teacher) in respect of that individual's personal information. The personal

information interests nonetheless relate to identifiable individuals, not to organizations. The s. 22 issue in this inquiry relates to the teacher as an identifiable individual, not to the BCTF or the NDTA. That is how I have addressed the issue in this order and, unless otherwise indicated, I have referred to the submissions tendered by the teacher, BCTF and NDTA in this order simply as the teacher's submissions.

[12] The teacher's initial submission raised three issues outside the notice of inquiry:

- whether notice of the inquiry should also be given to individuals other than the teacher because the reports contain their personal information too;
- whether s. 13(1) applies to information in the reports; and
- whether s. 21(1) applies to information in the reports.

[13] The question of notice to third-party individuals is addressed immediately below. Analysis of the application of s. 22 to personal information in the reports follows, then discussion of the s. 13(1) and s. 21(1) issues raised by the teacher's submission.

[14] **3.2 Notice To Third-Party Individuals** – The teacher's submission noted that the reports contain references to identifiable individuals other than the teacher and suggested that notice of the applicant's access request should be given to those individuals. In its reply, the School District addressed this issue as follows:

> Because the unsevered reports contain such a large amount of information about the teacher, the School District gave third party notice to the teacher, in part to afford [the teacher] an opportunity to review the proposed severing of the documents. The School District does not believe that the severed versions of the reports contain the personal information of any other identifiable individuals, other than the applicant and her children, and so did not serve notification to any other third parties.
>
> Prior to submitting the severed versions of the reports for this inquiry, the school district reviewed the reports again, particularly in regards to the information about the students interviewed during the investigation. Notwithstanding the fact that the students were not identified by name in the reports, as a result of this review the district further severed the sections related to the students, to ensure that no student could be identified.
>
> It is not the school district's intention to disclose the personal information of the teacher or of any individual other than the applicant and her children.

[15] Section 23 of the Act requires notification of third-party individuals where a public body intends to give access to information that it has reason to believe might be excepted from disclosure under s. 22. If the public body does not intend to give access to information that contains information excepted from disclosure under s. 22, the public body may give notice under s. 23, but is not required to do so. I take the School District to be saying that it did not intend to give access to information, that might be excepted under

s. 22, about identifiable individuals other than the applicant and her children, and therefore did not consider it necessary to notify any other third-party individuals.

[16] I have found that some personal information of School District officials falls under s. 22(4)(e) of the Act and is therefore not excepted from disclosure under s. 22. I have also found that disclosure to the applicant of third-party personal information in the complaint narrative of the applicant or her children—information that is obviously within the knowledge of the applicant because it is the very information that the applicant and her children provided to the School District—would not be an unreasonable invasion of the personal privacy of those third parties. I have found that other personal information in the reports attracts the presumption against disclosure in s. 22(3) of the Act, principally because it constitutes personnel or personal evaluations, or employment history relating to the teacher or school and School District officials or educational history relating other students. The disclosure of still other information in the reports is not problematic because it is not identifying.

[17] In all of the circumstances, I detect no deficiencies by the School District with respect to the notice requirement in s. 23 of the Act and, considering the personal information the School District intended to withhold, its decision to give notice to the teacher under s. 23 was in my view a cautious one.

[18] Section 54 of the Act provides for the Commissioner to give a copy of a request for review to the head of the public body concerned and to "any other person that the commissioner considers appropriate". The exercise of this discretion was considered to some degree in a preliminary ruling dated May 10, 2002, respecting Order 01-52, [2001] B.C.I.P.C.D. No. 55, and in *British Columbia (Minister of Water, Land and Air Protection)* v. *British Columbia (Information and Privacy Commissioner)* (2004) 26 B.C.L.R. (4th) 1 (C.A.), which also concerned Order 01-52.

[19] It was not considered appropriate here to notify others, beyond the School District, of the teacher's request for review, for the reasons that s. 23 notices to other individuals were not required. I would add that, at this stage, the inquiry arises from the teacher's request for review, which concerned protection of the teacher's personal privacy, so the focus of the inquiry was quite naturally on whether s. 22 requires the School District to refuse to disclose personal information about the teacher, and not on other issues or matters. This is not to say that unexpected issues may never cause the Commissioner to consider it appropriate to give notice to others under s. 54(b). As the Commissioner stated at p. 11 of his preliminary ruling respecting Order 01-52:

> There may be instances where it only becomes apparent at the review stage that a person was not notified by the public body under s. 23 when, as provided in s. 23, that person ought to have been. It is also possible that a public body may entirely overlook that the s. 21 or s. 22 disclosure exception might apply to some of the information involved. In such cases, the person who there is reason to believe might be a third party under s. 21 or s. 22 is given notice of the review under s. 54(b).

[20] For this inquiry, however, it was not appropriate to give notice under s. 54(b) of the Act to other individuals in respect of the application of s. 22 to the two reports.

[21] **3.3 Records in Dispute** – The reports were written by the same person, a social worker. Each report is 33 single-spaced pages long with several further pages attached as appendices.

[22] The first report is dated June 7, 2002, and relates to investigation of allegations of teacher misconduct ("first report"). It contains sections on the purpose, terms of reference and investigation methodology, a description of the events in question and the results of the investigation, broken down by allegation or complaint. This last section includes details of each allegation or complaint, accounts of the information gathered, in the form of interviews with the applicant, her daughters, the teacher and others, and the investigator's findings and discussion regarding each allegation or complaint.

[23] The second report is dated June 21, 2002, and relates to investigation of allegations and complaints of bullying and harassment at the school, and to review of the school and School District response to allegations of bullying, harassment and teacher misconduct at the school ("second report"). This report begins with descriptions of the purpose of the investigation, the terms of reference, the methodology and the events in question. It then discusses the steps taken in the investigation, including the information gathered, and concludes with the investigator's findings and recommendations. The content of the second report overlaps to some extent with that of the first report.

[24] The reports contain a good deal of educational history about the applicant's daughters, *e.g.*, the daughters' complaints and accounts of their meetings, interactions and experiences with the teacher, other school officials and the daughters' fellow students at their current school, the applicant's attempts with school and School District officials to resolve her complaints on her daughters' behalf and the daughters' past educational history. In some cases, the applicant provided this information, while in others it originated with the daughters, other students, the teacher or other school officials.

[25] The reports also contain a good deal of employment history about the teacher, *e.g.*, the applicant's complaints and allegations against the teacher, the teacher's responses to the complaints and allegations and the teacher's personal views about her or his behaviour or actions in the workplace. There is also some information in the reports that is employment history of other employees or officials of the School District.

[26] It is evident that the applicant is aware of much, though not all, of the personal information of the teacher, other students and other school or school district officials in the reports because:

- the applicant herself supplied the information to the school, the School District and the investigator, in the form of her complaints and allegations about the teacher and other students on her daughters' behalf, and accounts of her meetings, interviews,

interactions and incidents involving the teacher, her daughters, other students and other school and school district officials; or

- third parties provided the information to the applicant directly, or to other third parties in the presence of the applicant.

[27] **3.4 Section 22** – The applicant said she should receive complete copies of the two reports, while the teacher said they should be completely withheld. The School District's position fell in the middle, arguing that s. 22(3)(d) of the Act applies to some parts of the reports.

[28] The School District decided to disclose what it considers to be non-personal information, as well as personal information of the applicant and her two daughters, and to withhold what it considers to be the teacher's own personal information. I agree with the general approach taken by the School District. However, although the School District decided to disclose significant amounts of information in the reports, it has, in my view, been too cautious in that severing. I have concluded that the applicant is entitled to more information than the School District decided to disclose. I have also concluded the School District, through oversight or inconsistency, decided to disclose some information that s. 22 requires it to withhold and I have corrected this in severing I have done on copies of the reports that I am providing to the School District with this order.

[29] The Commissioner has considered the application of s. 22 in numerous orders (see, for example, Order 01-53, [2001] B.C.I.P.C.D. No. 56). I have also considered this exception on a number of occasions, in Order 02-56, [2002] B.C.I.P.C.D. No. 58, for example. I will apply here the principles set out in those orders, without repeating them.

[30] 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,
>
> (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,
>
> …
>
> (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

…

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that 20 disclosure is necessary to prosecute the violation or to continue the investigation,

…

(d) the personal information relates to employment, occupational or educational history,

…

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party, … .

(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, … .

Similarity to previous orders

[31] Before I continue, I should note that there are many similarities between the issues and arguments in this case and those with which the Commissioner has dealt in past orders, as have I. In Order 01-53, for example, the Commissioner considered and rejected many of the same types of arguments from the teacher as I am dealing with here.

[32] Other orders which deal with many of the same issues and arguments include these: Order 01-07, [2001] B.C.I.P.C.D. No 7, Order 00-53, [2000] B.C.I.P.C.D. No. 57, Order 01-54, [2001] B.C.I.P.C.D. No. 57, Order 03-34, [2003] B.C.I.P.C.D. No. 24, Order 03-24, [2003] B.C.I.P.C.D. No. 24, and Order 02-56. I found that all of these orders provide useful guidance in examining the issues before me in this inquiry.

Section 3 of the FOI Regulation

[33] The material before me indicates that the applicant's daughters were in their early teens at the time of the request. I infer that the School District, in responding to the

applicant's access request, accepted that she was entitled under s. 3 of the *Freedom of Information and Protection of Privacy Regulation*, B.C. Reg. 323/93, to exercise her daughters' rights of access to their own personal information on their behalf. Certainly no one has suggested otherwise in this inquiry.

Information that is not personal

[34] The School District recognized that s. 22 applies to personal information. It therefore correctly decided not to refuse access under s. 22 to information that is not personal information, such as the terms of reference for the investigations, the investigator's methodology and descriptions of the documentation reviewed.

[35] The School District also decided, inconsistently, to withhold information about school policies, practices and expectations, as well as aggregate references to students' activities and to their opinions and knowledge of school activities, policies and practices. These types of information are not "personal information" as defined in the Act and interpreted in previous orders. Section 22 does not apply to require the School District to refuse access to this information.

Names of individuals

[36] The applicant's access request stated that she did not object to the severing of individuals' names in the reports, as she was more interested in information about the teacher.

[37] The School District decided to withhold identifying information of third-party individuals, including names, the numbers the investigator assigned to the students and identifying references to school or School District officials. In view of the applicant's agreeability to the severing of names, I have considered the names of third-party individuals in the reports to be outside of the scope of the access request under consideration in this inquiry.

Section 22(4)(e)

[38] The applicant believes that information in the reports substantiating the allegations of harassment, bullying and misconduct falls under s. 22(4)(e), which deems disclosure of personal information about the teacher's position, functions or remuneration as an employee of the School District not to be an unreasonable invasion of the teacher's personal privacy.

[39] The School District acknowledges that a public body must consider if s. 22(4) applies to information in a record and disclose any information that falls under this subsection it says it has "considered s. 22(4) and has determined that the presumption that disclosure would not be an unreasonable invasion of privacy had not been rebutted" (para. 6, p. 2, initial submission).

[40] The School District's understanding of s. 22(4) is mistaken in that this subsection does not create a rebuttable presumption or a presumption at all. Section 22(4) provides that the disclosure of certain types of third-party personal information "is not" an unreasonable invasion of the third party's personal privacy and is therefore not subject to exception under s. 22. If personal information falls under s. 22(4), the section 22 analysis ends and there is no resort to the factors in s. 22(1), (2) or (3): see Order 02-56; *Architectural Institute of British Columbia* v. *British Columbia (Information and Privacy Commissioner),* [2004] B.C.J. No. 465 (S.C.); and Adjudication Order No. 2, June 19, 1997 (Bauman J.).

[41] The applicant's understanding of s. 22(4)(e) is also mistaken in that information substantiating allegations of harassment, bullying and misconduct by the teacher or students, would not be information about the teacher's "position, functions or remuneration".

[42] In my view, whether or not the School District's reasoning about the s. 22 framework was properly articulated, information the School District decided to disclose about normal or typical workplace activities of the teacher and other school officials, to the extent that it is personal information at all, falls under s. 22(4)(e) and the School District was correct not to refuse disclosure under s. 22.

[43] The School District also decided, incorrectly, that some similar information about normal or typical workplace activities fell under s. 22(3)(d) and must be withheld. I have marked that information for disclosure in the copies of the reports that will be delivered to the School District with this order.

Applicant's and daughters' personal information

[44] The reports contain references to the applicant and her daughters, such as their actions and dealings with the teacher and others. The School District's severing of the reports would generally disclose the applicant's and daughters' personal information to the applicant.

[45] By contrast, the teacher's submission argued, as noted earlier, that both reports are, in their entirety, the personal information of the teacher and, consequently, s. 22 requires them to be withheld in full, presumably whether or not there is personal information of the applicant and her daughters or others in the reports, even when information consists of complaint narratives that were provided by the applicant and her daughters.

[46] As noted above, the reports contain some information that is not personal information and is not required to be withheld under s. 22, this information being readily severable. For this reason alone, the teacher's submission that s. 22 requires all information in both reports to be withheld from the applicant is misconceived.

[47] The contention that the reports are not only *entirely* the personal information of the teacher, but that they are also *exclusively* the personal information of the teacher, is also

misconceived. The reports contain personal information of the teacher. They also contain personal information of the applicant, her daughters and other individuals. The second report in particular has less to do with the teacher than with complaints of bullying and harassment by other students and the response of the school and School District to these issues.

[48] The Commissioner has acknowledged that there are occasions—likely rare occasions—when the application of s. 22 means that an applicant is not entitled to his or her own personal information (see, for example, para. 48, Order 01-07). This would occur, for example, where personal information of an applicant and a third-party individual is intertwined and, because of the specific circumstances, disclosure of the third party's personal information to the applicant would unreasonably invade the personal privacy of the third party.

[49] I will now turn to analyzing the application of s. 22 to personal information in the reports.

[50] **3.5 Presumed Unreasonable Invasion of Personal Privacy** – Disclosure of the personal information described in ss. 22(3)(a) to (j) is presumed to be an unreasonable invasion of third-party personal privacy. The applicant is not a third party and in this inquiry she speaks for her daughters as well as herself.

[51] For personal information in the reports that falls under s. 22(3) in relation to individuals other than the applicant or her daughters, the presumption applies that disclosure would be an unreasonable invasion of the third parties' personal privacy. Personal information about the applicant or her daughters cannot fall under s. 22(3). Personal information about the applicant or her daughters *and* a third party can fall under s. 22(3) in relation to the third party, triggering the presumption that disclosure would be an unreasonable invasion of the third party's personal privacy.

Section 22(3)(d)

[52] The School District argued that s. 22(3)(d) applies to all of the information it decided to withhold in the reports, as personal information of the teacher relating to the teacher's employment history or personal information of third-party witnesses who were interviewed by the investigator in relation to their experiences of the teacher (in the case of the first report) and in relation to allegations of bullying and harassment (in the case of the second report) (para. 6, p. 2 & para. 1, p. 3, initial submission). The School District argued generally (at p. 2) that:

> Information created in the course of an investigation, and disciplinary matter in the workplace that consists of evidence or statements by a witness or complainant about an individual's workplace behaviour or actions, is information that relates to the third party's employment history, and are [*sic*] subject to the presumption created by *Section 22(3)(d)*. [italics in original]

[53] I agree that much of the information withheld by the School District falls under s. 22(3)(d) as employment history of the teacher or, to a lesser extent, as employment history of other School District personnel or educational history of students other than the applicant's daughters. I have taken into account one or two minor items that the School District decided to disclose, perhaps by oversight, but which in my view fall under s. 22(3)(d) as educational history of other students.

[54] As already discussed, however, the School District withheld some information about the standard or everyday duties, policies, actions and practices of the school or of the teacher and other school officials in the workplace (for example, paras. 5-9, p. 28, first report; last para., p. 30, second report). This type of information is similar to other information the School District decided to disclose. It is not third-party employment or educational history under s. 22(3)(d). Indeed, it is generally not personal information at all or it falls under s. 22(4)(e).

[55] The School District also decided to withhold a few lines of information that is clearly the applicant's own personal information (for example, references to the applicant's actions on pp. 24 and 25 of the second report), to which s. 22(3)(d) does not apply.

[56] The School District withheld some information that is educational history of the two daughters, and is not about other individuals, despite the fact that in other places the School District marked the same type of information for disclosure. The items withheld include passages recounting the daughters' reports to their mother of interactions with the teacher or other students (*e.g.*, para. 2, p. 23, first report; paras. 1 & 2, p. 27, first report; last para., p. 29, first report). Section 22(3)(d) does not apply to this personal information of the applicant's daughters.

Section 22(3)(g)

[57] The teacher's submission argued that s. 22(3)(g) applies to the reports in their entirety. The School District did not address s. 22(3)(g), which the Commissioner interpreted, in Order 01-07, as follows:

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

> a formal 'performance review', constituted the kind of evaluative material that is covered by s. 22(3)(g).

[58] The reports in issue here contain some information that constitutes personal or personnel evaluations by school and School District officials and the investigator about the workplace performance and actions of the teacher and other school and School District personnel relating to matters complained about by the applicant or her daughters, as well as how the school or School District responded to the complaints. This information falls under s. 22(3)(g) as the Commissioner has interpreted that provision. This information also falls under s. 22(3)(d) as employment history of the teacher and other school and School District personnel involved.

[59] The reports do not fall under s. 22(3)(g) in their entirety. In particular, information that is not personal information and information that falls under s. 22(4)(e) does not fall under s. 22(3)(g). Further, complaint narrative information from the applicant or her daughters, and information from witnesses about what did or did not occur in terms of conduct complained about by the applicant and her daughters, are not personal recommendations or evaluations, character references or personnel evaluations under s. 22(3)(g).

Section 22(3)(b)

[60] The teacher's submission argued that s. 22(3)(b) applies, as the reports contain personal information that was compiled and is identifiable as part of investigations into possible violations, by both the teacher and the School District, of ss. 15 to 17 of the *School Act*, the *School Regulation*, ss. 16, 28 to 40 of the *Teaching Profession Act*, and the relevant collective agreement under the *Labour Relations Code* (paras. 15-24, initial submission).

[61] The School District did not rely on s. 22(3)(b) and, in reply to the teacher's submission, said that ss. 15 and 16 of the collective agreement do not set out the grounds under which a teacher may be disciplined, but rather the process to be followed if discipline is being contemplated.

[62] A disciplinary investigation by a self-governing professional body, such as the Law Society of British Columbia or the College of Physicians and Surgeons of British Columbia, has been considered an investigation into a possible violation of law under s. 22(3)(b). See, for example, Order 02-20, [2002] B.C.I.P.C.D. No. 20, para. 20. The reports in question in this inquiry are not decisions of the British Columbia College of Teachers, an observation the teacher's submission was quick to make in connection with the applicant's reliance on s. 22(2)(a). Nor, for purposes of s. 22(3)(b), were the investigations to which the reports relate disciplinary investigations of the College of Teachers. This does not mean that those investigations could never be investigations into possible violations of law, but it does mean that the circumstances of this inquiry are not on all fours with Order 02-20.

[63] I find that I need not resolve the applicability of s. 22(3)(b) to the investigations to which the reports relate, however, because the third-party personal information to which s. 22(3)(b) would apply if the investigations were investigations into possible violations of law falls under s. 22(3)(d) and (g) and is therefore already subject to the s. 22(3) presumption against disclosure. Also, like the rest of s. 22(3), s. 22(3)(b) applies to personal information about third parties, not to non-personal information nor to personal information about the applicant and her daughters that is not also about a third party.

[64] The personal information of the teacher and other third-party individuals is protected by ss. 22(3)(d) and (g). It is therefore not necessary for me to consider whether s. 22(3)(b) also applies to that information.

[65] **3.6 Relevant Circumstances** – In determining under s. 22(1) or (3) whether disclosure of personal information constitutes an unreasonable invasion of third-party personal privacy, all relevant circumstances must be considered, including the considerations listed in s. 22(2). Various paragraphs in s. 22(2) were raised in the submissions. The teacher's submission added that the circumstances listed in s. 22(2) apply to all information in the reports, including any that may refer to the applicant.

Section 22(2)(a)

[66] The applicant said it is important that the School District be seen to deal effectively with matters such as her complaints, a point that appears to relate to s. 22(2)(a), disclosure for the purpose of subjecting the activities of the School District to public scrutiny. The applicant drew support from this Office's Investigation Report P99-013, (January 5, 1999), in which the previous Commissioner expressed his views on the publication of information about discipline decisions by the British Columbia College of Teachers. The teacher's submission argued that Investigation Report P99-013 has no application here.

[67] The College of Teachers is a self-governing professional body that must have regard for the public interest in carrying out its mandate under the *Teaching Profession Act*, which includes setting standards and disciplining its members. The reports requested by the applicant concern investigations into complaints made by the applicant and her daughters. Unlike the College of Teachers' discipline case summaries, the investigation reports are not disciplinary decisions, or decisions at all.

[68] It is evident from the reports that the applicant knows the School District took her concerns seriously and investigated them. The reports, as I would order them to be severed to protect third-party personal privacy, would provide the applicant with the terms of reference, some but not all of the information gathered in the course of the investigations and several of the investigator's findings and recommendations.

[69] Disclosure of the remaining third-party personal information (including witness opinions and personnel evaluations about the workplace actions of third-party individuals)

would not in my judgement assist in subjecting the School District's conduct of the investigations to public scrutiny. Nor would it add in a meaningful way to the public's understanding of that process. The fact that the applicant may continue to harbour dissatisfaction with the teacher, the school or the School District does not move the scale in favour of subjecting the activities of the School District to public scrutiny under s. 22(2)(a) by disclosing personal information that would unreasonably invade third-party personal privacy. See Order No. 62-1995, [1995], B.C.I.P.C.D. No. 35, and Order 02-56 for similar findings on this point.

Section 22(2)(b)

[70] Some of the applicant's arguments I took to relate to s. 22(2)(b), disclosure likely to promote public health and safety. She said it was critical for her to have access to the reports to determine whether her daughters' health and safety were affected or at risk, whether the teacher's actions were not isolated incidents and whether her allegations were substantiated. Section 22(2)(b) pertains to wider issues of public health and safety and the protection of the environment. Without in any way doubting the sincerity of the applicant's personal concern for her daughters' well-being at school, the promotion of public health and safety is not a prospect, in my view, much less a likelihood, of disclosure of personal information in the reports.

[71] I would add that, in her reply submission, the applicant also raised s. 22(4)(b) to justify disclosure of personal information in the reports—compelling circumstances affecting anyone's health or safety. I find no circumstances that compel disclosure of information in the reports under this provision.

Sections 22(2)(e), (g) and (h)

[72] The teacher's submission argued that s. 22(2)(e), (g) and (h) all apply to the two reports. It said the applicant was engaged in a "public campaign" to have the School District dismiss the teacher and also included *in camera* argument and affidavit evidence relevant to ss. 22(2)(e), (g) and (h).

[73] The applicant rejected the teacher's arguments on ss. 22(2)(e), (g) and (h). If the reports exonerate the teacher, she argued, there will be no harm on disclosure. If, on the other hand, the reports support the allegations against the teacher, the applicant suggested, any harm to which the teacher might be exposed or damage to reputation that might occur would not be "unfair". As for whether the reports contain inaccurate or unreliable information, the applicant suggested that it was up to the investigator to be satisfied that witnesses were providing accurate information. She objected to allegations that she is engaged in a public campaign to discredit the teacher and School District on the grounds that the allegations and accompanying media articles are prejudicial and inflammatory and her conduct is not the issue in this inquiry.

[74] I cannot say much about the teacher's arguments on these factors without revealing submissions, which I believe have been appropriately received *in camera*. On the basis of

the material before me, including my review of the reports and the *in camera* parts of the teacher's submission, I am unable to conclude that personal information in the reports is likely to be inaccurate or unreliable under s. 22(2)(g). However, I agree that if third-party personal information that falls under s. 22(3) were disclosed, a third-party individual would be exposed unfairly to "other harm" or might have her or his reputation unfairly damaged, as contemplated by ss. 22(2)(e) and (h).

[75] I attach little significance to the allegation that the applicant is waging a public campaign against the teacher and School District. It is evident that she is capable of doing this without the reports. See Order 01-53 for a similar comment.

Section 22(2)(f)

[76] The School District said that, in deciding to withhold personal information of the teacher and other third parties that falls under s. 22(3)(d), the School District also considered it relevant that this information was supplied to the investigator in confidence within the meaning of s. 22(2)(f). The School District provided no evidence of confidential supply, however, such as statements or affidavits from the investigator, the teacher or others whom the investigator interviewed.

[77] The teacher's submission argued s. 22(2)(f) applies to the reports and included a statutory declaration of the president of the NDTA, in which she deposed that it is the practice of the school board and the expectation of the NDTA and its members that investigations and discipline of members will be dealt with in a "confidential manner" in accordance with Article 16 of the collective agreement. Articles 16.3 and 16.8 of the collective agreement between the School District and the British Columbia Public School Employers' Association, on the one hand, and the NDTA and BCTF, on the other, are attached to the NDTA president's statutory declaration. Article 16.3 says the parties to the collective agreement recognize that dismissal and disciplinary matters shall be treated confidentially. Article 16.8 says the parties shall not release discipline or dismissal information about a teacher to the media or the public, except where the parties agree.

[78] The NDTA president went on to express the view that disclosure of investigation reports related to discipline matters "will adversely affect successful labour relations by inhibiting full and frank discussion by the parties involved in the investigatory process". Again, no direct evidence about confidential supply from the investigator, teacher or others interviewed by the investigator was provided.

[79] The applicant believes that witnesses participate in an investigation on the understanding that what they say will become part of the investigator's report and that the report itself will become fully or partially available to the public.

[80] It is important to recall that s. 22 does not require non-personal information or personal information falling under s. 22(4) to be withheld. The factors in s. 22(2) do not change this. Further, the question under s. 22(2)(f) is whether personal information in the

reports "has been supplied in confidence". Agreement between the School District and third parties to treat matters confidentially does not mean that the applicant, her daughters, or anyone else, in fact supplied personal information in confidence. Indeed, quite the opposite may be true, depending on the circumstances. Agreement between the School District and third parties to treat matters confidentially also does not mean information that originated with or was generated by the School District or its investigator can fall under s. 22(2)(f). The School District and its investigator cannot confidentially supply information to themselves.

[81] The reports themselves do not indicate the investigations were conducted under conditions of confidentiality. No evidence from the investigator, teacher or other individuals interviewed by the investigator has been provided in the submissions to the inquiry. The most that can be said of the evidence that has been provided is that the teacher may have had an expectation of confidentiality respecting information the teacher supplied in response to the complaints of the applicant and her daughters. I have already found that personal information of this type in the reports falls under s. 22(3). Its disclosure is presumed to be an unreasonable invasion of the personal privacy of the teacher. On the evidence before me, s. 22(2)(f) may reinforce the s. 22(3) presumption with regard to that information, but would not otherwise be a relevant factor.

Applicant's awareness of third-party personal information

[82] The Commissioner has said, as have I, that an applicant's awareness of a third party's personal information is a factor to consider in the application of s. 22. It is a particularly compelling consideration when the applicant provided the personal information in question to the public body. See, for example, paras. 71-81, Order 01-53, where the Commissioner found that an applicant's awareness of her own allegations about the third party (not least because she had set them down in her complaint letter to the public body) and her knowledge of the third party's identifying information meant that disclosure of that information to the applicant was not an unreasonable invasion of the third party's personal privacy. Among other things, the Commissioner found there that it would be absurd to sever an applicant's own complaint letter to the public body.

Conclusion on s. 22(1)

[83] I have concluded that it would not be an unreasonable invasion of the third parties' personal privacy for third-party personal information in the reports that was provided by the applicant or her daughters to be disclosed to the applicant. The School District decided to disclose much of this type of information (*e.g.*, paras. 1 & 5, p. 6, first report; para. 4, p. 7, first report), but I have corrected some inconsistencies in this area in the severed copies of the reports that are being provided to the School District with this order. Examples of information of this kind that s. 22 does not require the School District to refuse to disclose include:

- the applicant's report of her concerns about the teacher's behaviour in the workplace (para. 3, p. 5, first report);

- an account of a conference call, at which the applicant was present, during which the daughters' father conversed with the teacher (para. 4, p. 6, first report);
- the applicant's report of the teacher's response to her concerns (para. 3, p. 6, first report);
- the teacher's account of something the teacher told the applicant (last para., p. 123, first report);
- a school official's account of something the applicant said about the teacher (para. 3, p. 6, second report);
- the teacher's account of a conversation the teacher had with the applicant (para. 5, p. 9, second report); and
- the applicant's remarks about the actions of School District officials (para. 1, p. 17, second report).

[84] The School District also decided to withhold under s. 22(3)(d) other information which the applicant provided or is otherwise aware of, such as: the names of schools the daughters attended; the type of classes the teacher taught; the types of activities during which the daughters alleged the incidents occurred; and some details of the incidents and complaints (*e.g.*, para. 2, p. 5, first report). Some of this information is not personal information, while the applicant's knowledge of the other information means that its disclosure is not an unreasonable invasion of third-party personal privacy. I have added these types of information for disclosure.

[85] No other relevant circumstances favour disclosure of other ss. 22(3)(d) and (g) personal information of the teacher, other students or other school or school district officials in the two reports, which I conclude the School District was correct in deciding to withhold from the applicant.

[86] **3.7 Policy Advice And Recommendations** – The School District did not rely on s. 13(1) to refuse to disclose information in the two reports. This remains the same at the inquiry stage. The teacher's submission nonetheless argues that s. 13(1) authorizes the School District to withhold both reports. It concludes on this point as follows (para. 48, initial submission):

> We say that the disclosure of the Reports would reveal both advice and recommendations developed by and for the Public Body. Consequently we say that the Public Body is authorized by section 13 of the Act to refuse to disclose the Reports. While this may be a discretionary ground for refusing disclosure, we say that Article 16 of the collective agreement removes any element of discretion and requires that the Public Body not disclose the Reports.

[87] The purpose of s. 13(1) is to protect a public body's internal decision-making process and its ability to obtain full and frank advice and recommendations on proposed

courses of action, among other things. The Act does not require or otherwise contemplate public bodies giving third-party notice in respect of s. 13. This legislative choice reflects the fact that s. 13(1) addresses public body, not third-party, interests in withholding access to information. If a public body relies on s. 13(1) to withhold information from an access applicant, the access applicant can request a review of that decision, including the public body's application of s. 13(1) to requested records. A third party may not, however, as a means of advancing its own interests or taking up the public body's interests, challenge a public body's assessment that facts or other circumstances do not permit or justify the application, in the public body's interests, of s. 13(1) to requested records.

[88] The School District did not apply s. 13(1) to any information in the requested reports or offer an explanation in that regard. Nor was it required to, by the Act or for the purposes of this inquiry.

[89] Even if some or all information in the two reports could potentially have fallen under s. 13(1), I do not agree with the teacher's submission. The wording of Article 16 of the collective agreement does not compel the application of s. 13(1). It is also highly questionable that the operation of the Act or exercise of the School District's discretion under the Act, in relation to the applicant, could be dictated in the collective agreement by the parties to that agreement.

[90] **3.8 Third-Party Business Information** – Section 21(1) is a mandatory exception that protects third-party business interests under prescribed conditions. Paragraphs (a), (b) and (c) of s. 21(1) must each be met for the exception to apply. The teacher's submissions argue that the following provisions in s. 21(1) apply to require the School District to withhold the two reports in full:

> **Disclosure harmful to business interests of a third party**
>
> 21(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> …
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> …
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> …
>
> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other

> person or body appointed to resolve or inquire into a labour relations dispute.

Burden of proof

[91] The applicant had the burden of proving that s. 22 did not require the School District to withhold personal information in the reports. This is reversed for s. 21(1).

[92] Section 57(3) of the Act provides that "[a]t an inquiry into a decision to give an applicant access to all or part of a record containing information that relates to a third party",

> (a) in the case of personal information, 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, and
>
> (b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part.

[93] Section 57(3)(a) refers to the application of s. 22 to personal information in disputed records. It put the burden of proof on the applicant with respect to the application of s. 22 to personal information in the two reports. Section 57(3)(b) applies "in any other case", including the application of s. 21. It puts the burden of proof on the third party to prove that the applicant has no right of access to information in the reports because s. 21(1) applies to that information.

[94] There is also the "information that relates to a third party" component of s. 57(3), that applies to both paragraph (a) and paragraph (b). Whether and what information in the reports "relates to" the teacher, BCTF or NDTA or would reveal information "of or about" the teacher, BCTF or NDTA, is discussed below in connection with s. 21(1)(a).

Section 21(1)(a)

[95] The relevant question about s. 21(1)(a) is whether information in the reports is "labour relations…information of or about a third party". The teacher's submission says that disclosure of the reports would reveal labour relations information of or about the teacher, NDTA and BCTF, including information about their representation of the teacher, their member. The applicant believes that "labour relations information" relates to matters such as industrial espionage and collective bargaining, which are not involved in the reports.

[96] The reports are the result of investigation into the applicant's complaints and allegations, on her daughters' behalf, against her daughters' teacher and other students in their school. Some information in the reports relates to school policies and practices. Much more information in them relates to investigation of the applicant's complaints and allegations. The reports do not contain information respecting collective bargaining or

negotiating positions as between the NDTA, BCTF or School District. They contain information about the teacher. I do not accept the apparent characterization in the teacher's submission of information about the conduct of the teacher as information about the NDTA's and BCTF's representation of their member, the teacher.

[97] The meaning of labour relations information has arisen in relation to two areas of the Ontario information and privacy legislation: s. 17 of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F-31, the Ontario counterpart of s. 21 of the Act, and s. 65(6)3 of the statute, which excludes from the Ontario Act's scope all records collected, prepared, maintained or used by or on behalf of an institution in relation to meetings, consultations, discussions or communications about "labour relations or employment-related matters" in which the institution has an interest.

[98] In *Ontario (Minister of Health and Long-Term Care)* v. *Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123, the Ontario Court of Appeal held as follows concerning the meaning of "labour relations" in s. 65(6)3 of the Ontario statute:

> [1] … The phrase is not defined in that Act, and its ordinary meaning can extend to relations and conditions of work beyond those relating to collective bargaining. Nor is there any reason to restrict the meaning of "labour relations" to employer/employee relationships; to do so would render the phrase "employment-related matters" redundant.
>
> [2] The relationship between the government and physicians, and the work of the Physician Services Committee in discharging its mandate on their behalf, including provisions for remuneration of physicians, fall within the phrase "labour relations" …

[99] Ontario Order PO-2211, [2003] O.I.P.C. No. 257, following the above decision of the Ontario Court of Appeal, interpreted "labour relations" in s. 65(6)3 to mean "the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships".

[100] Section 21(1)(a)(ii) of the Act refers to "labour relations information" but, unlike s. 65(6)3 of the Ontario legislation, it does not also refer to "employment-related matters", a more expansive phrase. I conclude that "labour relations information" in s. 21(1)(a)(ii) may not necessarily be strictly limited to the collective bargaining relationship between employer and union in that it may also include negotiations, bargaining and related matters between parties to analogous relationships. At the same time, labour relations information is not synonymous with the wider category of information about an individual's actions on the job, and information may be "of or about" an employee without being "of or about" organizations to which the employee belongs, in this case the BCTF or the NDTA.

[101] In my view, the reports do not contain information "of or about" the BCTF or NDTA.

[102] There is information in the reports that may fairly be described as "of or about" the teacher—the complaints of the applicant and her daughters about the teacher, information from witnesses about the complaints, responses to the complaints by the teacher and evaluations of the teacher's conduct. This information concerns specific on-the-job conduct, or alleged conduct, of the teacher. It may relate broadly to the teacher's employment, but it does not concern a collective relationship between the School District and union organized employees, or others in an analogous relationship with the School District. I am inclined to conclude that this information, which is very conduct-specific to the teacher and does not involve bargaining, negotiating or related collective labour relationship matters, is not labour relations information.

Section 21(1)(b)

[103] The teacher's submission said that s. 21(1)(b) is satisfied because information in the reports was supplied in confidence in accordance with Article 16 of the collective agreement. The applicant suggested that participants in workplace investigations know that the resulting reports will become public, although she provided no support for this argument.

[104] In connection with whether personal information in the reports was supplied in confidence under s. 22(2)(f), as I said earlier, the most that could be said of the evidence in this inquiry is that the teacher may have had an expectation of confidentiality respecting personal information the teacher supplied in response to the complaints of the applicant and her daughters.

[105] Similarly for s. 21(1)(b), the evidence indicates that information the teacher supplied in response to the complaints of the applicant and her daughters may have been supplied in confidence. The significance of this for the applicability of s. 21(1) would depend, of course, on information in the reports that is of or about the teacher being labour relations information under s. 21(1)(a)(ii) and on the disclosure of information confidentially supplied by the teacher falling under s. 21(1)(c).

[106] The evidence does not support a conclusion that other information in the reports was supplied in confidence, and there is no evidence that the BCTF or NDTA supplied any information in the reports.

Section 21(1)(c)(ii)

[107] The teacher's submission argued that disclosure of the reports would result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied. The applicant disagreed, suggesting that collective bargaining and labour relations are not negatively affected by revealing the truth.

[108] The teacher's submission, through the affidavit of the NDTA president, contends that disclosure of investigation reports might have a "chilling effect" on successful labour

relations, but no specific and concrete evidence was provided that disclosure of the reports would result in information similar to that in the reports no longer being supplied to the School District. It is clear that the applicant, at least, would be quite willing to supply information in similar future situations. It is also clear that much information in the reports was not supplied at all, but rather was compiled or generated by the investigator in the form of her analysis, findings and recommendations, as well as accounts of school policies and practices. I find that s. 21(1)(c)(ii) does not apply to information in the reports.

Section 21(1)(c)(iv)

[109] The teacher's submission also said that s. 21(1)(c)(iv) is also satisfied as "disclosure would reveal information prepared by a person appointed to inquire into a labour relations dispute (the author of the Reports)". The applicant disagreed, saying that her complaints were not a labour relations dispute.

[110] A labour relations dispute is a dispute among parties to a labour relationship concerning some aspect of that relationship. The reports relate to investigations of the complaints of the applicant and her daughters, who were not parties to a labour relationship or engaged in a labour relations dispute. Neither the School District, nor the investigator who generated the reports, was a person appointed to resolve or inquire into a dispute or, more particularly, a labour relations dispute.

[111] I find that s. 21(1)(c) does not apply to information in the reports.

[112] In view of my findings respecting paragraphs (a), (b) and (c) of s. 21(1), I conclude that s. 21(1) does not require the School District to refuse to disclose information in the reports.

4.0 CONCLUSION

[113] For reasons discussed above, I find that s. 22 of the Act requires the School District to refuse to give the applicant access to the information marked in red ink in the copies of the requested reports that I am providing to the School District with this order. Under s. 58 of the Act, I require the School District to refuse access under s. 22 to the marked information and I find that s. 21 does not require the School District to refuse to give the applicant access to information in the reports.

[114] I make no finding as to the applicability of s. 13(1) to information in the reports.

January 14, 2005

ORIGINAL SIGNED BY

Celia Francis
Adjudicator