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

Order F05-31

THE BOARD OF SCHOOL TRUSTEES OF SCHOOL DISTRICT No. 39 (VANCOUVER)

Celia Francis, Adjudicator

September 20, 2005

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Summary: Union requested name(s) of person(s) who requested information on leave for union business by members of the union executive. School District denied access under s. 22. Section 22 applies to the name of the third party.

Key Words: unreasonable invasion—submitted in confidence—personal privacy—fair determination of rights—mailing lists or solicitations—political beliefs or associations.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 22(1), 22(2)(c) & (f), 22(3)(i) & (j).

Authorities Considered: B.C.: Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 01-19, [2001] B.C.I.P.C.D. No. 20; Order 03-34, [2003] B.C.I.P.C.D. No. 34; Order 04-04, [2004] B.C.I.P.C.D. No. 4; Order 04-37, [2004] B.C.I.P.C.D. No. 38; Order 04-34, [2004] B.C.I.P.C.D. No. 35.

Cases Considered: *Attorney General (British Columbia) v. British Columbia (Information & Privacy Commissioner)* (2004), 34 B.C.L.R. (4th) 298, [2004] B.C.J. No. 2534 (S.C.); *Kenney v. Loewen* (1999), 64 B.C.L.R. (3d) 346 (S.C.); *Irwin Toy Ltd. v. Doe* (2000), 12 C.P.C. (5th) 103 (Ont. S.C.J.); *BMG Canada Inc. v. John Doe*, 2005 FCA 193, [2005] F.C.J. No. 858 (C.A.); *Straka v. Humber River Regional Hospital et al.* (2000), 51 O.R. (3d) 1, [2000] O.J. No. 4212 (C.A.).

1.0 INTRODUCTION

[1] The International Union of Operating Engineers, Local 963 ("IUOE") made a request ("current request") under the *Freedom of Information and Protection of Privacy Act* ("Act") to the Board of School Trustees of School District No. 39 (Vancouver School Board or "VSB"), as follows:

> … the name or names of applicants pursuant to a Freedom of Information request ["original request"] made early this summer regarding the International Union of Operating Engineers, Local 963, and specifically with regard to a request for data related to "Union Book-Offs".

[2] The VSB refused the IUOE access to the requested information under s. 22(1) of the Act. The IUOE requested a review ("current request for review") by this Office of the VSB's decision, saying nothing in the Act prevented release of the name. It suggested that the person who had made the original request was a member of the IUOE and had made the request for political purposes.

[3] 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. The Office invited and received submissions from the VSB, the IUOE and the third party, that is, the applicant who made the original request for records about the IUOE.

2.0 ISSUE

[4] The issue before me in this case is whether the VSB is required by s. 22 to refuse access to the third party's name. The record containing the disputed information is the "original request", that is, the third party's request for union book-off information on certain IUOE Board members.

[5] Under s. 57(2) of the Act, the IUOE as the applicant has the burden of proof regarding third-party personal information.

3.0 DISCUSSION

[6] **3.1 Background**—I begin by providing background information on the chronology of the original request, the VSB's response to that request and the original request for review, to put the current request for review and the disputed information in context.

[7] The VSB says that, in January 2004, it received the original request under the Act from the original applicant (now the "third party" in this case) for specific information

about six identified VSB employees, members of the executive of IUOE Local 963, as follows:

- the number of days and the dates upon which the six employees were absent from work on union business from January 1, 2000 to January 1 2004;
- hourly wage rate information for each employee.

[8] The VSB says that it provided the wage rate information but, under s. 22(3)(d) of the Act, denied access to specific information regarding leave booked by individual employees. The applicant requested a review ("original request for review") of the VSB's refusal to provide the union book-off information. During mediation of the original request for review through this Office, the VSB says it disclosed, with the original applicant's agreement, "an annualized figure showing an aggregate of the total hours of Union leave taken by the six identified employees" (paras. 1-4, initial submission).

[9] The IUOE confirms that the current request and current request for review sprang from the original request for union book-off information. It explains what it means by a "union book off" as follows:

> 13. A "union book off" simply refers to an agreement between the VSB and Local 963 that if members of Local 963 are working on union business, they so advise the VSB, and are booked off of their regular duties as employees of the VSB for that time. The VSB continues to pay the wages of that member, but prepares and sends an invoice to Local 963 for the repayment of those wages to the VSB. Once Local 963 receives the invoice, it repays the VSB. The net effect of this arrangement is that the member is paid by the Local 963, not the VSB, for the time they work on union business, and the union office has a record of the time so paid. [De Vivo affidavit]

[10] The IUOE says it learned of the original request in mid-April 2004 from the VSB's legal counsel who, it said, told the IUOE that a member of the executive board of Local 963 had made the request. (The VSB's legal counsel says the IUOE must have misunderstood him on this point, as he did not tell the IUOE the request was from a Local 963 board member but rather was about board members. He says he could not in any case have identified any members of the Board other than those with whom he had regular dealings; see p. 2, VSB's reply.) The IUOE says that the VSB apparently provided the requested information soon after. The IUOE also states this book-off information was readily available from its own records on request (pp. 1-2, initial submission; paras. 14-15, De Vivo affidavit).

[11] The IUOE continues at p. 2 of its initial submission as follows:

> The "original" FOI applicant then published the fact that he/she had made the FOIPPA request and had received certain information in a public bulletin provided to members of Local 963. The publication which contains that information is, in

> the opinion of this applicant [the IUOE], defamatory of the applicant, and the applicant wishes to commence legal proceedings sounding in defamation as a result.

[12] The IUOE says that this information was subsequently used during the election of the Board of Local 963 (p. 4, initial submission). The IUOE provides a copy of a document that it claims is defamatory of the Board of Local 963 and which, it claims, contains information derived from the original request. It says it intends to "pursue legal action" against the author or authors of this document on behalf of Local 963. It says that its legal counsel has advised it that, in order to "pursue" a defamation action against the author or authors of the document, it is necessary to identify that person or those persons. The IUOE says that it therefore made a request for the name of the original applicant (now the third party in this inquiry) to which the VSB responded by denying access, hence this inquiry (p. 4, initial submission; paras. 16-24, De Vivo affidavit).

[13] **3.2 Procedural Objections**—The IUOE raised two objections in its submission. One concerned its request for two documents and one is related to the way the original request was handled.

Request for two documents

[14] The IUOE argues in a letter of March 31 that the VSB is "making submissions" around the original request to the VSB and the VSB's response to that request. It says that, before making its reply, it should receive copies of these two items, with identifying information removed, as otherwise

> … we would have no opportunity to provide any submissions about the contents of the documents or any considerations which may arise from them. That, with respect, would prevent this Applicant from knowing all of the case it had to meet and would prevent us from making full reply to it.

[15] The Registrar of Inquiries for this Office asked the other parties to comment on the IUOE's request. The VSB did not object to the IUOE receiving severed copies of the original request and its response but, in a letter received by this Office on April 8, 2005, the third party did object, also requesting that his or her name "be held in complete confidence". The Registrar then told the IUOE that the adjudicator would decide whether it was appropriate to provide the IUOE with severed copies of these two documents. The IUOE reiterated its objection to not receiving the two documents in its reply submission.

[16] The material before me includes an *in camera* copy of the original request, which contains the information in dispute. I would say that the VSB's initial submission reproduces the essential elements of that request, in slightly different wording, and is not lacking in any material respect. Furthermore, it is possible that, even with identifying information removed, the IUOE would be able to identify the third party from the form of the original request. This would defeat the purpose of this inquiry.

[17] The VSB did not supply a copy of its response to the original access request, although its initial submission sets out the essentials from its decision letter (outlined below). I do not find it necessary for the purposes of this inquiry to review the VSB's response to the original request.

[18] The IUOE made detailed submissions on the issues based on the VSB's submissions. It has not explained how it is unable to meet its case without copies of the two documents it wants. The IUOE is after someone else's name. I do not see how the IUOE could reasonably be said to need the original access request or the VSB's response to make full arguments on why it should be given access to that personal information. I decline to do as the IUOE asks.

Lack of notice

[19] The IUOE also complains that it was not given notice under s. 23 of the Act of the original request, nor of the original request for review, despite the fact that the original request related to named individuals (paras. 13 & 27, reply). The VSB responds that it was not required to give notice under s. 23 of the Act (para. 8, initial submission; p. 1, reply).

[20] This issue is not properly before me in this inquiry and I make no comment on whether or not the IUOE was entitled to s. 23 notice in the original request or the original request for review. I note in passing, however, that the wage rate information likely falls under s. 22(4)(e) of the Act and that an "annualized figure" of total leave taken could almost certainly not be linked to identifiable individuals. It would thus not be "personal information" as defined in the Act.

[21] **3.3 Personal Privacy**—Numerous orders have considered the application of s. 22. See, for example, Order 01-53.[1] I have applied here, without repeating it, the approach taken in those orders. The relevant provisions 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 …
>
> (c) the personal information is relevant to a fair determination of the applicant's rights, …
>
> (f) the personal information has been supplied in confidence, …

[1] [2001] B.C.I.P.C.D. No. 56.

> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if …
>
> (i) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations, or
>
> (j) the personal information consists of the third party's name, address, or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

[22] **3.4 Is the Disputed Information Contact or Personal Information?**—The IUOE argues that the third party's name is not "personal information" but rather is excluded from the definition of "personal information" because it is the third party's "contact information". It says the third party made the original request for a purpose related to union business—the election which was upcoming at that time. Since the third party was engaged on union business, or purported to be, the IUOE says, the definition of "contact information" expressly allows the third party's name to be disclosed (pp. 2-4, initial submission).

[23] The VSB takes the position that the third party's name is clearly "personal information" and would reveal that the third party exercised his or her statutory right to make an access request (para. 5, initial submission). In its reply (at p.1), it refutes the IUOE's argument on "contact information" as follows:

> The exclusion is clearly intended to allow publication of business addresses and phone numbers with names. The Applicant does not seek access to the name, address or telephone number of the Third Party in any business capacity, but in their capacity as an applicant under the *Freedom of Information and Protection of Privacy Act*. In this context the name of the Third Party is clearly personal information.

[24] The definition of "personal information" in Schedule 1 was amended on October 21, 2004, through the addition of the phrase "other than contact information". The definition of "contact information" was added at the same time. The relevant definitions, as they now read, are:

> **"personal information"** means recorded information about an identifiable individual other than contact information
>
> **"contact information"** means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual

[25] The IUOE says it recognizes that previous orders have found that the name of a third party is personal information but says that these orders pre-date the amendments. The IUOE thinks it is time to look at the definition of "personal information" afresh, in light of the amendments. Not only is there no statutory right to anonymity for access to

information applicants, the IUOE says, the Legislature specifically rejected that principle in making the amendments it did in October 2004 (pp. 3-4, initial submission; paras. 52-54, reply).

[26] I think the VSB's suggested rationale for the amendment excluding contact information from the definition of personal information has merit. I also take it that the purpose of the exclusion is to clarify that information that relates to the ability to communicate with a person at that person's place of work, in a business capacity, is not personal information and that public bodies need not have s. 22 concerns regarding disclosure of such information in response to access requests or under Part 3 of the Act.

[27] The third party did not purport in the original request to be representing the union or union members or to be conducting union business in making the original request. There is no indication in the original request of the purpose of, or motivation behind, the request.

[28] The third party chose in her or his submissions to provide the reasons for making the original request (as outlined elsewhere in this decision), although these reasons are not evident from the request. While the reasons show that the purpose of the original request was to obtain information for use in an upcoming union election, this does not mean that the third party was acting in a business capacity as employee, agent or other representative of another person (here, supposedly the union itself) in making the request, such that the identifying personal information in dispute here could be said to be contact and not personal information. On the contrary, the third party's reasons show that he or she made the request in a personal capacity. In the context of the original request, therefore, I conclude that the third party was acting in a personal capacity. I find that the third party's name is not "contact information" as defined in the Act.

[29] A number of previous orders have found a person's name to be personal information as defined in the Act (see Order 01-19,[2] for example). I see no need to revisit the definition of "personal information" in light of the October 2004 amendments, as the IUOE suggests. The information in dispute, the third party's name in the context of the original request, is recorded information about an identifiable individual and is therefore "personal information" as defined in the Act.

[30] **3.5 Unreasonable Invasion of Privacy**—If the third party's name is not contact information, the IUOE argues in the alternative that its disclosure would not be an unreasonable invasion of privacy, as the name does not fall into any of the subsections of s. 22(3). The only subsection that the name could even remotely fall into, it says, is s. 22(3)(j) and this subsection is inapplicable as the IUOE does not intend to use the information for mailing lists or solicitations (p. 6, initial submission). The VSB says that the third party's name in this context would reveal political beliefs or associations and therefore falls under s. 22(3)(i) (p. 2, reply).

[2] [2001] B.C.I.P.C.D. No. 20.

Political beliefs or associations

[31] The VSB says that the record that the IUOE seeks would disclose the fact that the third party chose to make the original request, the nature of the records sought and the reasons for seeking information—all the third party's personal information, it says. The VSB believes that disclosure of the third party's name could allow the IUOE to infer the third party's political beliefs or associations by revealing the third party's views or position on the internal affairs of the union. The third party's motivation for requesting the information in the original request was not relevant to its processing of that request, the VSB says. Members of the public should not have to risk indirect disclosure of their views in order to exercise their right of access under the Act. There might be a chilling effect on applicants if their names were disclosed, it says (paras. 5 & 9-10, initial submission; p. 2, reply).

[32] The IUOE agrees that the third party's motivation for making the original request is irrelevant. It otherwise rejects the VSB's arguments on these points, referring to Order 03-34[3] for support of its points on the VSB's "chilling effect" issue (paras. 45-51 & 55-66, reply).

[33] The third party confirms that he or she made the original request for information about union book-off time for use in the election of the Board of Local 963 (upcoming at that time), as many union members thought that a comparison of current and past expenditures of union dues in this area would be valuable in electing new representatives to the Board. The third party says that the intention in requesting the information was not to impugn the character of any incumbent Local 963 Board member, but to put forward accurate figures on the total sums for comparison purposes and so union members could decide if they were getting value for money (dues) spent (p. 1, initial submission; p. 1, reply).

[34] I am not persuaded that the wording of the original request in itself reveals the third party's reasons for making the request or, directly or indirectly, the third party's views on the union's internal affairs (assuming for the purposes of this discussion that such views reveal "political beliefs or associations"). On its face, the most the original request shows is an interest in the amount of leave for union business certain union Board members took. I do not think that one can infer anything with any certainty about the third party's political beliefs or associations from the request itself. Even knowing the third party's stated reasons does not necessarily help one determine the third party's views or position on union matters nor, directly or indirectly, the third party's political beliefs or associations. I consider that the VSB is reading more into the request than is merited. I find that disclosure of the third party's name would not reveal information that falls into s. 22(3)(i).

[3] [2004] B.C.I.P.C.D. No. 34.

Mailing lists or solicitations

[35] The IUOE says it does not intend to use the third party's name for purposes set out in s. 22(3)(j) and I see no indication in the material before me that it intends to use the information this way. A stated intention to sue someone does not constitute a use contemplated by s. 22(3)(j) and I find that this section does not apply to the third party's name.

[36] **3.6 Relevant Circumstances**—The IUOE argues that s. 22(2)(c) is relevant in this case. It also says that its own knowledge of the personal information in question is relevant, as is the "third party's "self-publication" of his/her involvement in the FOI application". The IUOE argues that no relevant circumstances favour withholding the information (pp. 8-10, initial submission).

[37] The VSB argues that s. 22(2)(f) is relevant and favours withholding the information (para. 7, initial submission). The third party also makes submissions related to this factor (see reply, for example).

Relevance to applicant's rights

[38] The IUOE says it wishes to sue the applicant for statements the third party allegedly made in a document. It attaches a copy of this document, which it calls a "bulletin" and which, it says, supports its argument that the third party was engaged or purported to be engaged in union business in making the original request. The IUOE says it therefore needs the third party's name (pp. 4 & 7, initial submission; paras. 3-6, De Vivo affidavit).

[39] The IUOE refers (at p. 7 of its initial submission) to Order 01-53, where the Information and Privacy Commissioner set out the test for determining if personal information is relevant to a fair determination of the applicant's rights, as follows:

> [54] In this respect, I said the following in Order 01-07, at paras. 30 and 31, about determining whether s. 22(2)(c) applies:
>
> > [30] 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.
> >
> > [31] 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).

[40] The IUOE says (at p. 8, initial submission) that all of these circumstances set out above apply here. First, it says the legal right it asserts is the right not to be defamed, a right from the common law. Its business manager then says he is contemplating suing the applicant on behalf of Local 963 and that Local 963's legal counsel has advised it that for Local 963 to "pursue" a defamation action against the author or authors of the bulletin, it is necessary to identify the author or authors of the document. The IUOE says that it therefore needs the name. It argues that the personal information it seeks has a bearing on the determination of the right in question, because

> A suit sounding in defamation requires the plaintiff to prove that a particular person has spoken or written the defamatory words in questions [*sic*].

[41] Finally, it argues, the personal information is necessary to prepare for the contemplated lawsuit and to ensure a fair hearing. Without the name, it argues, the suit cannot proceed and thus necessity is established (p. 8, initial submission). The IUOE continues in a similar vein in its reply, arguing that this factor outweighs any right to anonymity that the third party may have (paras. 43-47, reply).

[42] The VSB says that the document which the IUOE says is defamatory does not say who authored it and thus the authorship will remain unclear, regardless of the outcome of this inquiry. The VSB also suggests that it is possible that the third party could, truthfully, deny authorship of the document, even if the third party's identity were revealed as the original applicant for records. The VSB therefore questions the relevance of the information to a fair determination of the IUOE's rights (p. 2, reply)

[43] The third party suggests that the IUOE is attempting to fabricate a legal argument to obtain the third party's name "to seek punitive action against me" in the form of a lawsuit. The third party says the IUOE's submission is "specious at best and misrepresents the facts and order of occurrence" (p. 1, reply). The third party rejects the IUOE's argument that the Board was defamed, saying the information was accurate and printed as received from the VSB, although, since this information was made available to the union membership, members of the union executive have claimed that the information is inaccurate and that the third party was "spreading lies".

[44] The third party expresses concern about the executive's reaction and believes that disclosure of her or his name might lead to some form of union discipline or censure and claims that other union members have been the object of vindictive behaviour after questioning the motives or leadership of the current Board executive. (The third party provides no evidentiary support for this assertion.) The third party also points out that there would still be no way of linking his or her name to the allegedly defamatory document, as he or she could have obtained the information and then given it to someone else (p. 2, initial submission: pp. 1-2, reply).

[45] Again, in arguing that s. 22(2)(c) applies because the third party's personal information is relevant to a fair determination of the IUOE's rights, the IUOE says it must know the applicant's identity in order to "pursue" legal action for defamation. Paris J. said the following in *Attorney General (British Columbia) v. British Columbia (Information & Privacy Commissioner)*:[4]

> Rights Affected Directly or Indirectly
>
> ¶59 One does have the legal right to a good reputation, assuming, of course, that it is merited. It is enforceable, as witness the common law action of defamation….

[46] In saying that one has the legal right to a good reputation, Paris J. was clearly saying that the right not to be defamed is a legal right and that an action of defamation is the means to protect one's reputation. In light of the criteria set out above from Order 01-53, and the comments by Paris J., I conclude that the right to sue for defamation is a right within the meaning of s. 22(2)(c).

[47] It seems to me, however, on the basis of the IUOE's material, that if anyone has been defamed, it would be individuals who are also members of the IUOE Local 963 executive. I do not see how any alleged defamation of these individuals would give IUOE Local 963 itself a right to sue for defamation or on any other basis. Any right to sue for defamation is that of the individuals, not the IUOE itself. In the absence of an explanation as to how the legal rights of the IUOE itself are engaged here, the need of IUOE Local 963 for the third party's personal information is not established for this reason.

[48] The IUOE also asserts that it is contemplating suing the author or authors of the "bulletin" for defamation but it has not shown with any cogency how it, as opposed to the individuals who were the subject of the original request, was defamed. Nor has the IUOE provided any proof that it is contemplating suing (for example, in the form of a resolution of its Board). In my view, more is necessary to fulfil the second part of the test than merely asserting that one is contemplating suing.

[49] I also fail to see how knowing the name of the third party has any bearing on the authorship of the "bulletin" and thus on any legal rights of the IUOE. The IUOE has not shown that the third party and the author or authors of the allegedly defamatory "bulletin" are the same person.

[50] In any case, independent of the above, the IUOE has not shown that it needs the personal information in order to start an action for defamation, making that information relevant to a fair determination of rights. I say this because, even accepting for discussion purposes that IUOE Local 963 has a cause of action for defamation in its

[4] (2004), 34 B.C.L.R. (4th) 298, [2004] B.C.J. No. 2534 (S.C.).

own right, the IUOE does not need to know the identity of the third party to begin such a lawsuit. A defamation action can be started against unidentified defendants, in a so-called John Doe action. A plaintiff can then seek a court order for disclosure of information in the hands of third parties, for the purpose of discovering the identity of the person responsible for the defamation. This is clear, as regards defamation actions,[5] from *Kenney v. Loewen*[6] and *Irwin Toy Ltd. v. Doe.*[7]

[51] The IUOE has not established that s. 22(2)(c) has any application in this case. I find that it is not relevant here.

Confidential supply

[52] The VSB says that the third party asked in the original access request that the request be kept confidential and that this is an important factor to consider here. It says that the third party provided no rationale for making the original request and that, as a result, when processing the current request, it was required to balance the third party's privacy interests against what seemed to be "the mere curiosity of the Applicant [the IUOE]". In the VSB's view, this balance could only be resolved in favour of the third party. The VSB rejects the IUOE's argument that the Act does not specifically prohibit the release of an applicant's identity, saying the issue here is the proper application of s. 22 (para. 7, initial submission).

[53] The IUOE rejects the relevance of s. 22(2)(f). It again says it is unable to comment properly on this point, as it does not have a copy of the original request (paras. 39-41, reply).

[54] The third party's original request did ask that the VSB keep the request confidential. The third party reiterates this point in the letter received April 8, 2005 that I mention above and asks in her or his inquiry submissions that her or his name be kept confidential. These statements support the argument that the third party supplied his or her name in confidence to the VSB in the context of the original request. There is also no indication that the VSB has not kept the name confidential since receiving the request. I find that s. 22(2)(f) is relevant here and favours withholding the third party's name.

Extent of the applicant's knowledge

[55] The IUOE refers to Order 04-04,[8] in which I said that an applicant's knowledge of personal information was relevant to a determination of whether disclosure of personal

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[5] Canadian courts have also accepted that a plaintiff can sue an unidentified defendant for copyright infringement and then use rules of court, or the equitable action for discovery, to obtain a court order requiring third parties to disclose information to identify the defendant. See, for example, *BMG Canada Inc. v. John Doe*, 2005 FCA 193, [2005] F.C.J. No. 858 (C.A.).

[6] (1999), 64 B.C.L.R. (3d) 346 (S.C.). See the excellent discussion of this issue in Roger D. McConchie, *Canadian Libel and Slander Actions* (Toronto: Irwin Law Inc., 2004), at pp. 726-730.

[7] (2000), 12 C.P.C. (5th) 103 (Ont. S.C.J.). Also see *Straka v. Humber River Regional Hospital et al.* (2000), 51 O.R. (3d) 1, [2000] O.J. No. 4212 (C.A.).

[8] [2004] B.C.I.P.C.D. No. 4.

information would result in an unreasonable invasion of third party privacy. The IUOE says it learned that the third party was, in April 2004, a member of the 11-member Board of Local 963 (which the VSB denies telling the IUOE, as noted earlier). It then sets out how, by a process of elimination, it deduced that the third party must be one of three named Board members. A lawsuit would have costs attached to it, the IUOE says, and could lead to personal upset and distress to those who did not make the request, which would be unfair. Disclosure of the third party's name would avoid such consequences, it says (pp. 8-9, initial submission; paras. 9-12, De Vivo affidavit).

[56] The IUOE is correct in saying that past orders have considered an applicant's awareness of third-party personal information to be a relevant factor in deciding whether s. 22 applies or not. This can occur, for example, where it is clear from the submissions or the disputed records that an applicant provided the personal information to the public body or was present when the personal information was disclosed, *e.g.*, in a meeting or a telephone conversation. There must be an objective basis for finding that the factor applies and favours disclosure of the disputed information. Guesswork does not count.

[57] The IUOE's deduction that the third party can only be one of three named members of the Board of Local 963 (which appears, in any case, to be based on a flawed assumption) does not assist it here. Arguing that the third party must be one of three named people does not prove that the third party is one of those three people. Nor does it prove that the IUOE has any knowledge of the third party's identity.[9] Even if the IUOE narrowed its deduction down to one of the three individuals, it would be doing nothing more than guessing who it thinks the third party is. The IUOE has produced no objective proof that it is aware of the third party's identity and there is no indication in the material before me that the IUOE is aware of this information. I find that this factor is not relevant here.

"Self-publication"

[58] The IUOE also submits that the third party has committed a public act by publishing the results of the original request in a public bulletin to members of Local 963 and has also identified him/herself as part of a particular group. The IUOE argues that, having done this, the third party has already disclosed the fact of the original freedom of information request, as well as the information received. The IUOE argues that the third party in having done so is not requesting anonymity but "is instead figuratively shouting from the rooftops that he/she is the applicant". These factors mitigate against protecting the third party's name, the IUOE concludes (p. 9, initial submission).

[59] The VSB responds that, while it has no knowledge of the facts the IUOE refers to in its initial submission, if the third party had indeed "truly identified" herself or himself publicly, "this would seem to eliminate the need for the current request" (p. 2, reply).

[9] I should emphasize here, for clarity, that nothing in this decision can be read to confirm or deny that the third party is one of the individuals the IUOE thinks he or she is.

[60] I have already discussed how the allegedly defamatory document, the "bulletin" in question, does not say who its author is. It simply says it is "From the Committee for Democratic Union", apparently a group representing the interests of some members of Local 963. Among other things, it contains information on the total number of union book-off days that six named individuals took over a certain period and that the book-off information flowed from a freedom of information request, made because the union executive denied "some of our members" the information. The document does not link or purport to link itself to any individual as author or authors. I reject the IUOE's contention that this "bulletin" constitutes the third party's "self-publication" of his or her identity. This factor does not apply here.

Does section 22(1) require the VSB to withhold the third party's name?

[61] I have found that the third party's name is not "contact information" and is "personal information", as defined in the Act. None of the presumed unreasonable invasions of personal privacy under s. 22(3) applies here. I have, however, also found that there are no relevant circumstances favouring disclosure of the third party's name and that the factor in s. 22(2)(f) applies, thus favouring withholding the name. The IUOE has the burden of establishing that disclosure of the personal information in dispute would not unreasonably invade the third party's personal privacy. I find that s. 22(1) requires the VSB to withhold the third party's name. (See Order 04-37[10] and Order 04-34[11] for similar findings.)

4.0 CONCLUSION

[62] For the reasons given above, under s. 58 of the Act, I require the VSB to refuse to disclose the third party's name under s. 22(1) of the Act.

September 20, 2005

ORIGINAL SIGNED BY

Celia Francis
Adjudicator

OIPC File No. F04-22656

[10] [2004] B.C.I.P.C.D. No. 38.
[11] [2004] B.C.I.P.C.D. No. 35.