Order F07-02

DISTRICT OF SPARWOOD

Justine Austin-Olsen, Adjudicator
January 29, 2007

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Summary: The applicant requested access to records related to his noise complaint about his neighbour. The District refused the applicant full or partial access to the records on the basis of ss. 12(3)(b), 13(1), and 22(1) of FIPPA. The District is authorized by s. 13(1) of FIPPA to refuse the applicant access to a memorandum containing advice and recommendations to the Mayor and Council. The District is not authorized by s. 12(3)(b) to refuse the applicant access to the minutes of an *in camera* meeting because the evidence does not establish that the meeting was properly held *in camera*. The District is required to refuse the applicant access to information in the remaining records which is strictly that of the third party, but must not refuse access to information which is not personal information or is the applicant's own personal information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(3)(b), 13(1), 15(1)(g), 22(1), 22(2)(f), 22(3)(b), 79; *Community Charter*, ss. 90(1)(f),(g), 92; Law Society of British Columbia, *Professional Conduct Handbook*, Chapter 6, Rule 7.

Authorities Considered: B.C.: Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order 01-48, [2001] B.C.I.P.C.D. No. 50; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order F05-06, [2005] B.C.I.P.C.D. No. 7.; *Pierro v. Drake Medox Health Services (Vancouver) Ltd.,* [2003] B.C.H.R.T.D. No. 33; *Metcalfe v. International Union of Operating Engineers, Local 882*, [2004] B.C.H.R.T.D. No. 293.

Cases Considered: *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560; *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)*, [1993] B.C.J. No. 2337 (B.C.C.A.); *College of Physicians & Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 2779, 2002 BCCA 665; *British Columbia Teachers' Federation v. British Columbia (Information and Privacy Commissioner)*, 2006 BCSC 131.

1.0 INTRODUCTION

[1] This inquiry concerns a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for access to records resulting from the applicant's complaint to the District of Sparwood ("District") about his neighbour's noisy hot tub.

[2] In September 2004 the applicant complained to the District that he was being disturbed by the noise from the motor of his neighbour's hot tub. The Bylaw Enforcement Officer, Shelley Bodie, investigated the complaint and attempted unsuccessfully to facilitate a resolution between the two neighbours. Before Ms. Bodie closed her investigation, but apparently suspecting what the outcome might be, the applicant wrote a letter to the District Mayor and Council at the end of June 2005 reiterating his complaint and his understanding of the investigation and requesting them to "HELP PLEASE".[1]

[3] On July 8, 2005, Ms. Bodie wrote to the applicant and advised him that the Mayor and Council had considered his letter at an *in camera* meeting and had directed her to close the file. On July 12, 2006 the applicant made a formal request under FIPPA for access to all records related to the investigation of his complaint. The District initially withheld all of the records in their entirety under s. 15 of FIPPA, which in turn prompted the applicant to request a review of the decision from this Office.

[4] As a result of mediation, the District released some records to the applicant. It continued to withhold a memorandum from the District Administrator, Sandy Hansen, to the Mayor and Council (the "memorandum")[2] under s. 13(1) and an excerpt of the minutes of the *in camera* meeting held by Council (the "minutes")[3] under s. 12(3)(b) of FIPPA. The remaining records, consisting essentially of Ms. Bodie's investigative file (the "investigative file records"),[4] were either withheld or severed by the District under ss. 15 and 22(1) of FIPPA. Collectively, the memorandum, the minutes, and the investigative file records represent the records in dispute in this inquiry.

[5] Because the matter did not fully settle in mediation, a written inquiry took place under Part 5 of FIPPA to deal with the remaining issues.

2.0 ISSUES

[6] In its submissions, the District indicated that it was withdrawing its reliance on s. 15 and was "prepared to release such portion of the documents to the [a]pplicant."[5] As such, the issues in this inquiry are as follows:

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[1] District's document package, pp. 17-18.
[2] District's document package, pp. 19-20.
[3] District's document package, p. 21.
[4] District's document package, pp. 2-16.
[5] District's initial submission, para. 23.

1. Is the District authorized by s. 12(3)(b) to refuse access to the minutes?

2. Is the District authorized by s. 13(1) to refuse access to the memorandum?

3. Is the District required by s. 22(1) to sever or refuse access to the investigative file records?

[7] Under s. 57(1) of FIPPA, the District has the burden of proof with respect to the application of ss. 12 and 13. Under s. 57(2) of FIPPA the applicant has the burden of proving that s. 22(1) does not require the District to refuse access to records containing third party personal information.

3.0 DISCUSSION

[8] **3.1 Procedural Objection––Conflict of Interest**—In his reply submission the applicant raised an objection to the lawyer representing the District in this inquiry, stating that he was concerned about a possible conflict of interest because the applicant had "consulted with this lawyer" in the past.[6] The applicant, who is not represented by counsel, did not elaborate further but I take from his complaint that his concern is whether in these circumstances the lawyer should be permitted to represent the District in this inquiry.

[9] The lawyer for the District quite rightly took the applicant's complaint about the potential conflict seriously and addressed it in a letter to this Office dated February 24, 2006. In the letter, the lawyer stated that while he does have a record of providing summary advice to the applicant in 2002, it was on a matter unrelated to the issues being dealt with by this inquiry. The letter quotes from the British Columbia Law Society, *Professional Conduct Handbook*, Chapter 16, Rule 7, which provides:

> **Acting against a former client**
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> 7. Subject to Rule 7.4, a lawyer must not represent a client for the purpose of acting against the interests of a former client of the lawyer unless:
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> …
>
> (b) the new representation is substantially unrelated to the lawyer's representation of the former client, and the lawyer does not possess confidential information arising from the representation of the former client that might reasonably affect the new representation.

[10] The letter then goes on to state:

[6] Applicant's reply submission, p.1.

> Our firm's representation of the District of Sparwood is completely unrelated to our firm's representation of the Applicant, and our firm does not posses[s] confidential information arising from that representation of the Applicant that might reasonably [a]ffect the representation of the District of Sparwood.

[11] The letter closes by advising that further details of the lawyer's involvement with the applicant can only be disclosed with the applicant's express consent. A copy of this letter was forwarded to the applicant, who did not respond further.

[12] The first question is whether I even have the power to act upon the applicant's objection. The weight of authority indicates that I do. In *Prassad v. Canada (Minister of Employment and Immigration)*, Justice Sopinka expressed the fundamental principle as follows:[7]

> …We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice. …

[13] The power of an administrative tribunal to determine who can appear before it is a procedural matter. The British Columbia Human Rights Tribunal has on previous occasions considered applications to bar individuals from appearing before it on the grounds of conflict of interest. Relying on the principle in *Prassad* stated above, the Tribunal in *Pierro v. Drake Medox Health Services (Vancouver) Ltd.* concluded that it had the power to determine who could appear before it, but that such a serious decision must be approached fairly and with caution.[8]

[14] In *Metcalfe v. International Union of Operating Engineers, Local 882* the Tribunal built on what was said in *Pierro* and concluded:[9]

> In my view, the Tribunal may act to bar an individual, whether an agent or a lawyer, from appearing before it, where such an order is necessary in order to ensure a fair hearing. As recognized by the Tribunal in *Pierro*, such an application is a serious matter, as an order barring counsel has the effect of interfering with the other party's right to be represented by the counsel of their choice. The jurisdiction to control who appears before the Tribunal is therefore to be exercised with caution.

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[7] *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 at para. 16. See also**,** *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)*, [1993] B.C.J. No. 2337 (B.C.C.A.), at paras. 14-15; application for leave to appeal dismissed without reasons, [1994] S.C.C.A. No. 7.

[8] *Pierro v. Drake Medox Health Services (Vancouver) Ltd.,* [2003] B.C.H.R.T.D. No. 33 at paras. 20-22.

[9] *Metcalfe v. International Union of Operating Engineers, Local 882*, [2004] B.C.H.R.T.D. No. 293 at para. 7.

[15] There is no question that parties to an inquiry under FIPPA may be represented by either a lawyer or an agent.[10] However, I agree with the conclusion of the Tribunal in *Metcalfe* that, where it is necessary to ensure fairness, the Commissioner may bar an individual from representing a party in an inquiry. I agree also that the power to make such a decision should be exercised judiciously and with caution.

[16] The next question is whether or not the lawyer in this case should be permitted to continue his representation of the District in this inquiry. Given the circumstances, I am satisfied that he should. The lawyer has represented to this Office that he has complied with the directives in the *Professional Conduct Handbook* and there is no evidence to the contrary. There is nothing to indicate that the fairness of this inquiry would be compromised by the lawyer continuing to represent the District in this matter. On the contrary, to insist that the District find other counsel at this stage could create unfairness.

[17] **3.2 Section 13––Advice or Recommendations**—As noted above, the District has declined to provide the applicant with a copy of the memorandum on the grounds that s. 13(1) applies to it. In its submissions the District notes that arguably some factual information may be severed from the record and disclosed to the applicant as required by s. 13(2) of FIPPA.[11] The District did not say why, if this is so, it did not release more information before, as required by s. 13(2).

[18] The relevant portions of s. 13 of FIPPA provide:

> 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
>
> (2) The head of a public body must not refuse to disclose under subsection (1)
>
> (a) any factual material,

[19] Previous orders of the Commissioner and court decisions have considered both the purpose of s. 13 of FIPPA and what appropriately constitutes advice and recommendations under that section. In Order 01-15, the Commissioner described the purpose of s. 13 as being:[12]

> … designed, in my view, to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations.

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[10] Section 56(5) of FIPPA provides:

> The person who asked for the review, the head of the public body concerned and any person given a copy of the request for a review may be represented at the inquiry by counsel or an agent.

[11] District's initial submission at para. 9.

[12] Order 01-15, [2001] B.C.I.P.C.D. No. 16 at para. 22.

[20] The British Columbia Court of Appeal similarly concluded:[13]

> [105] In my view, s. 13 of [FIPPA] recognizes that some degree of deliberative secrecy fosters the decision-making process, by keeping investigations and deliberations focussed on the substantive issues, free of disruption from extensive and routine inquiries. …

[21] In this case, the memorandum clearly contains advice and also provides a recommendation to the District. The exceptions are those sentences identified by the District in paragraph 9 of its initial submission. I agree that this constitutes factual material to which s. 13(2)(a) applies.

[22] In addition to the portions of the memorandum identified by the District, I find that the whole of the first paragraph must similarly be disclosed.

[23] The remainder of the memorandum is properly subject to s. 13(1) and the District is authorized by FIPPA to withhold it from the applicant if it so chooses.

[24] **3.3 Section 12–Local Public Body Confidences**—Section 12(3)(b) of FIPPA provides:

> (3) The head of a local public body may refuse to disclose to an applicant information that would reveal
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> …
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> (b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.

[25] As described above, the District has applied s. 12(3)(b) to withhold from the applicant an excerpt from the minutes of the council meeting held *in camera* on July 4, 2005. The first question is whether the meeting in question was properly held *in camera*. If it was not, then the District cannot use s. 12(3)(b) to withhold the minutes.

[26] In its submission, the District cites s. 90(1)(f) and (g) of the *Community Charter* as providing the required statutory authority to hold the July 4, 2005 meeting *in camera*:

> 90(1) A part of a council meeting may be closed to the public if the subject matter being considered relates to or is one or more of the following:
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> …

[13] *College of Physicians & Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 2779, 2002 BCCA 665 at para. 105.

> (f) law enforcement, if the council considers that disclosure could reasonably be expected to harm the conduct of an investigation under or enforcement of an enactment;
>
> (g) litigation or potential litigation affecting the municipality;

[27] The District goes on to say:

> Clearly, the Mayor and Council had authority to hold a meeting *in camera* to address the memorandum of June 29th, 2005 of Sandy Hansen, regarding the letter from the Applicant. The matter related to the enforcement of the District of Sparwood Noise Bylaw, and litigation or potential litigation [a]ffecting the Municipality, given the Applicant's threat to sue the Bylaw Enforcement Officer and the District of Sparwood.

[28] Unfortunately, the District did not provide any evidence that it complied with s. 92 of the *Community Charter*, which provides:

> **Requirements before meeting is closed**
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> 92 Before holding a meeting or part of a meeting that is to be closed to the public, a council must state, by resolution passed in a public meeting,
>
> (a) the fact that the meeting or part is to be closed, and
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> (b) the basis under the applicable subsection of section 90 on which the meeting or part is to be closed.

[29] I have no evidence before me that the required resolution was passed, and on that basis, I am unable to find that the meeting was properly held *in camera*. However, for the reasons discussed below, even if the District had provided evidence that the requirements of s. 92 were satisfied, I would find that the meeting was not properly held *in camera* because the evidence does not establish that it was authorized by ss. 90(1)(f) and (g) of the *Community Charter* as the District claims.

[30] I do not agree with the District's submission that ss. 90(1)(f) and (g) "clearly" authorized the meeting to be held *in camera*. While it is clear that the matter related to the investigation and enforcement of a potential bylaw infraction, s. 90(1)(f) requires more than this. It requires the municipal council to consider that disclosure in a public meeting could reasonably be expected to harm the conduct of the investigation or enforcement of the bylaw. The District did not provide any evidence of this.

[31] With respect to s. 90(1)(g), the evidence of "potential litigation affecting the municipality" offered by the District is the alleged statement by the applicant to Ms. Bodie that he would sue her, the District and "anyone else" he could.[14] It is clear from the material submitted in this inquiry that the emotions of those

[14] District's initial submission at para. 4.

involved in this dispute were running high. That being said, I do not find the evidence, which is based only on statements the applicant is said to have made to Ms. Bodie, sufficient to establish that there was "potential litigation affecting the municipality."

[32] The complete context in which the alleged threat to sue was made is found in part of the investigative file records which were released to the applicant.[15] On that page, Ms. Bodie describes a telephone conversation with the applicant during which the applicant expressed his frustration and then, according to Ms. Bodie's recorded recollection, said "I will sue you and sue the District and anyone else I can get!" This, of course, is her recollection of what the applicant said, but even if it is entirely accurate, it appears to be more of an emotional outburst rather than a legitimate and serious threat of litigation.

[33] In another telephone conversation with the applicant, Ms. Bodie reports that the applicant again mentions that he may "go through a lawyer."[16] Two weeks later, she writes that the applicant approached her in a mall and, after some discussion about the ongoing matter, said to her, "You are sloughing your duties again."[17] In a memo to Sandy Hansen dated June 13, 2005, Ms. Bodie says that the applicant is not satisfied with the efforts made to resolve his noise complaint and "has been threatening to take this matter to his lawyer since October 2004."[18] She goes on to say:[19]

> I feel that this department has done as much as we can to find an amicable agreement between these parties, as the [applicant] is not going to be satisfied unless the hot tub is removed. I am not sure of what legal powers the District has to force the removal of the hot tub and therefore, I am requesting your input in this matter.

[34] In the above excerpt, the question relates to the legal power of the District to act, and not to "potential litigation." There is no evidence that the applicant ever carried through with any of the statements he apparently made to Ms. Bodie or that they were treated as anything more than threats in the air.

[35] With regard to the memorandum the District withheld from the applicant, I can say that it similarly does not provide sufficient evidence to ground the District's claim. I find that, taken as a whole, the evidence does not support the District's claim that it was entitled to hold an *in camera* meeting pursuant to s. 90(1)(g).

[36] Before concluding I must briefly address a final argument made by the District with respect to the *in camera* meeting. In its submissions the District

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[15] District's document package, p. 12.
[16] District's document package, p. 15.
[17] District's document package, p. 15.
[18] District's document package, p. 10 contains a note by Ms. Bodie that the applicant "threatened to sue the District or hold back taxes."
[19] District's document package, p. 16.

suggested that it would "result in an absurdity" if I were to find that the meeting could not be held *in camera*. According to the District:

> If the meeting had not been held *in camera*, the Bylaw Enforcement Officer report and the memorandum of Sandy Hansen would have been required to be disclosed on the agenda. If not held *in camera*, such would result in an absurdity as pursuant to Section 22(1) of the Act, the Head of the Public Body, being Sandy Hansen, was required to withhold disclosure of personal information contained in the report of the Bylaw Enforcement Officer, and as well, her memorandum which is able to be withheld from disclosure as discussed *supra*.

[37] It appears the District is suggesting that, if a record is discussed by a municipal council at an open meeting, it becomes a "public record", thus forcing the disclosure of personal information otherwise protected by s. 22(1) and removing the District's ability to exercise its discretion to withhold information under s. 13.

[38] There are serious problems with the District's argument. First, the District has provided no authority for the suggestion that the law requires every record discussed by a municipal council in a public meeting to become a "public record", such that it must afterward be disclosed in full. To this extent the District's argument overlooks s. 79 of FIPPA:

> 79 If a provision of this Act is inconsistent or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act.

[39] The *Community Charter* does not provide any express authority to override the provisions of FIPPA with respect to records discussed in open council meetings. If FIPPA applies to all or part of a record, the fact that the record is discussed by a municipal council at an open meeting does not mean that FIPPA no longer applies to the record. To the extent it purports to result in the contrary, any policy or bylaw passed by the District has no effect.

[40] Second, accepting the District's argument would result in an absurdity because it would mean that any time a municipal council met and considered any record to which any exception to disclosure under FIPPA might apply the meeting could be held *in camera*. This is clearly not consistent with the letter or spirit of the *Community Charter*, which expressly states the limited circumstances under which a municipal council may (s. 90(1)) or must (s. 90(2)) close a meeting to the public.

[41] There is express authority in those sections of the *Community Charter* for a municipal council to meet *in camera* on a matter related to FIPPA, but it is limited. Section 90(1)(j) of the *Community Charter* permits a municipal council to meet *in camera* if the subject matter being considered relates to or is information that is prohibited from disclosure under s. 21 of FIPPA. Section 21 of FIPPA

applies to records which, if disclosed, could reasonably be expected to harm specified business interests of a third party and does not apply to the records in dispute in this inquiry.

[42] The other express authority under the *Community Charter* to close a meeting relating to a matter under FIPPA is in s. 90(2)(a), which requires a municipal council to meet *in camera* if the subject matter being considered relates to a request under FIPPA and the council is the designated head of the local public body for the purposes of FIPPA. In this inquiry, the *in camera* meeting that was held did not relate to a request under FIPPA and, according to the District, the designated head of the District for the purposes of FIPPA is not the Mayor or Council, but the District's Chief Administrative Officer, Sandy Hansen.[20]

[43] To accept the District's argument would be to accept the suggestion that the application of FIPPA somehow expands the ambit of authority under the *Community Charter* for a municipal council to hold a meeting *in camera*. This is clearly not the case.

[44] For the reasons set out above, I find that the July 4, 2005 meeting of Council was not properly held *in camera*. There is no evidence that the requirements of s. 92 of the *Community Charter* were complied with. In addition, the evidence also does not establish that Council was authorized by ss. 90(1)(f) or (g) of the *Community Charter* to hold the meeting *in camera*. As a result, I find that the District is not authorized by s. 12(3)(b) of FIPPA to withhold the minutes from the applicant.

[45] 3.4 **Section 22 of the Act––**The portions of s. 22 of FIPPA that are relevant in this case read as follows:

> 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
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> …
>
> (f) the personal information has been supplied in confidence,
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> …
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
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> …
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except

[20] Affidavit of Sandy Hansen at paras. 2 and 3.

> to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,

[46] In Order 01-53 and other orders, the Commissioner has set out the manner in which s. 22 is to be applied.[21] Without repeating it here, I have applied the approach set out in Order 01-53.

[47] As noted above, s. 57(2) of FIPPA provides that the applicant bears the burden of proof that disclosing the personal information of the third party to him would not constitute an unreasonable invasion of personal privacy.

Do the records contain "personal information" of the third party?

[48] The investigative file records consist of the following:

1. Photographs of the third party's property and hot tub ("photographs");[22]
2. A letter from Shelley Bodie to the third party ("letter");[23]
3. Emails from the third party to Shelley Bodie ("emails");[24]
4. Shelley Bodie's running report about her investigation of the noise complaint ("investigation report");[25]
5. A memorandum from Shelley Bodie to Sandy Hansen dated June 13, 2005 ("Shelley Bodie's memo").[26]

[49] The first three items were withheld in their entirety, while the fourth and fifth were provided to the applicant in severed form.

[50] The first step is to determine whether or not these records contain personal information, which is defined in Schedule 1 of FIPPA:

> "personal information" means recorded information about an identifiable individual other than contact information.

[51] In this case, the photographs depicting the third party's house and the offending hot tub, along with the accompanying text, are not personal information because they are not "information about an identifiable individual." For example, in some cases it is difficult or impossible to even identify the subject of the photograph as a hot tub.

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[21] Order 01-53, [2001] B.C.I.P.C.D. No. 56 at paras. 22-24. See also, *British Columbia Teachers' Federation v. British Columbia (Information and Privacy Commissioner)*, 2006 BCSC 131 at para. 45.
[22] District's document package pp. 2, 4, 5, and 7.
[23] District's document package pp. 3.
[24] District's document package pp. 6 and 8.
[25] District's document package pp. 9-15.
[26] District's document package p. 16.

[52] The only possible exception might be the street address, which is that of the third party, indicated in some of the accompanying text. However, as I discuss further below, given that the applicant knows exactly where the third party—his neighbour—lives, I fail to see how disclosure of this information to the applicant could in any way constitute an unreasonable invasion of the third party's personal privacy. I find that s. 22 does not apply to the photographs and that the District is not required by s. 22(1) of FIPPA to sever the accompanying text.

[53] The remainder of the investigative file records—the letter, emails, the investigation report and Shelley Bodie's memo—all contain personal information because they contain identifiable information about the third party, the applicant, and the ongoing dispute between these two neighbours.

Would disclosure constitute an unreasonable invasion of personal privacy?

[54] In the copies of the severed documents provided to me, the District indicates the information it understands to be personal information and marks it as subject to s. 22(1) of FIPPA. In its submissions, the District does not specifically address s. 22(1), but discusses the presumption of s. 22(3)(b) and says that s. 22(2)(f) is a relevant circumstance weighing against disclosure.

[55] As noted above, s. 22(3)(b) creates a statutory presumption that disclosure of personal information is presumed to be an unreasonable invasion of personal privacy if:

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

[56] Section 22(2)(f) directs a public body to consider whether the personal information has been supplied in confidence when determining if its disclosure would constitute an unreasonable invasion of a third party's personal privacy.

[57] The District's submissions in this regard are as follows:[27]

> The information supplied by the Third Party was compiled and is identifiable as part of an investigation into a possible violation of law and disclosure of that information in not necessary to prosecute the violation or to continue the investigation, as the District of Sparwood has closed its file in the matter.
>
> In considering whether to release…Third Party information, the [District] considered the fact that such was compiled as part of the investigation into a possible violation of the District of Sparwood Noise Bylaw, and further,

[27] District's initial submission, paras. 19-20.

> the Third Party had been advised of the substance of the District of Sparwood policy regarding confidentiality of the information collected during the investigation of the alleged bylaw infraction, and that such information was in fact provided by the Third party in confidence.

[58] I agree that s. 22(3)(b) applies to all of the records I have noted above that contain some personal information—the letter, the emails, the investigation report and Shelley Bodie's memo. The personal information contained in these records was compiled and is identifiable as a part of an investigation into a possible violation of the Sparwood Noise Control Bylaw.[28] As such, there is a presumption that disclosure of third party personal information contained in the records would constitute an unreasonable invasion of personal privacy. Below I have considered whether that presumption is rebutted by any of the particular circumstances relevant to each of the remaining records.

The letter

[59] The District has withheld from the applicant the letter Shelley Bodie sent to the third party advising him of the noise complaint. None of the relevant factors listed in s. 22(2) apply to the letter. This includes s. 22(2)(f), because the letter does not contain any personal information "supplied by" the third party. In addition, any personal information contained in the letter, with the possible exception of the name of the third party, is already known to the applicant. I make this exception only because on the material I have before me, although the applicant obviously knows who his neighbour is, it is not clear that he actually knows his neighbour's name. I find that, with this small exception, the circumstances are such that the presumption in s. 22(3) has been rebutted and s. 22(1) does not require the District to refuse the applicant access to the letter.

The emails

[60] The District similarly withheld in their entirety the emails from the third party to Shelley Bodie. Some of the information contained in these emails is not personal information, for example, information about modifications made by the third party to the hot tub as part of his attempts to address the source of the noise complaint. Since this is not personal information, it cannot be withheld from the applicant under s. 22 of FIPPA.

[61] With respect to the personal information that is contained in the emails, the District has submitted s. 22(2)(f) a relevant factor to consider because it was supplied by the third party in confidence. On this issue, I accept the evidence in the affidavit of Shelley Bodie that the District has adopted a policy on the confidentiality of information provided by individuals regarding bylaw infractions and that she advised the third party of the substance of that policy during the course of her investigation.[29] Her evidence in this regard is consistent with

[28] Affidavit of Shelley Bodie, p.1 and Exhibit A.
[29] Affidavit of Shelley Bodie, p. 1 and Exhibit B.

a letter from the third party about this matter which the District submitted *in camera*.

[62] A review of the emails reveals that some of the personal information they contain is strictly that of the third party, in some cases having little or nothing to do with the complaint or its investigation, and of which the applicant has no knowledge. I find that, with regard to these portions of the emails, s. 22(2)(f) is a relevant factor that weighs against disclosure, and the District is required by s. 22(1) to sever the emails accordingly.

[63] That being said, while I agree that some of the personal information contained in the emails is strictly that of the third party, and must be severed from the records, the same cannot be said for all of the personal information contained in the emails. The emails also contain the personal information of the applicant. Although the emails were authored by the third party, some aspects of them express the third party's view of the applicant. These parts of the emails are the applicant's personal information because, although expressed by the third party, it is "recorded information about an identifiable individual"—that is, the applicant.

[64] In Order 01-48, the Commissioner dealt with a similar situation, where the records in issue were created in the context of a bylaw complaint investigation. The Commissioner found that letters written by the third party in response to the bylaw complaint contained the personal information of the applicants:[30]

> … Other aspects of the letter express the third party's views about the applicants, notably the male applicant. The Act's definition of "personal information" provides that it is "recorded information about an identifiable individual", including "anyone else's opinions about the individual." The third party's views and opinions about the applicants, as set out in both letters, are clearly their personal information.

[65] Although the definition of personal information in FIPPA referenced above has changed, it continues to be broadly worded and it certainly applies to the third party's references to the applicant which are contained in the emails. With respect to these parts of the emails, the fact that the information was supplied in confidence by the third party is a relevant consideration, but it is not determinative. As noted by the Commissioner in Order 01-48:[31]

> …[E]ven if the personal information had been supplied in confidence, I would not be persuaded that s. 22(2)(f) favours the withholding of the applicants' personal information. It would be perverse, in the ordinary case,

[30] Order 01-48, [2001] B.C.I.P.C.D. No. 50 at para. 42.
[31] Order 01-48, [2001] B.C.I.P.C.D. No. 50 at para. 52.

> for someone in the third party's position to be able, by getting a public body's assurance that someone else's personal information was being supplied in confidence, to deny those other individuals the right of access to their own personal information on that basis alone.

[66] While there may be cases in which an applicant would be unable to access his or her own personal information because its disclosure would unreasonably invade someone else's personal privacy, I am not persuaded that this is such a case. As the Commissioner noted, an assurance of confidentiality given to a third party will not, without something more, be sufficient to deny another individual access to his or her own personal information. This is true whether that assurance of confidentiality is express or implied, given in writing or verbally, provided generally as a matter of policy or individually in a particular case.

[67] With respect to the personal information of the applicant contained in the emails, I find that the presumption against disclosure has been rebutted by the other circumstances of this case. In particular, the applicant knows who the third party is and, as discussed below, he is familiar with many of the details of the investigation conducted by Ms. Bodie. The fact that the personal information in the emails was supplied in confidence by the third party is not sufficient to tip the balance in favour of refusing the applicant access to what is in fact his own personal information. I find that s. 22(1) does not require the District to refuse the applicant access to the third party's opinions about the applicant which are contained in the emails.

The investigation report and Shelley Bodie's memo

[68] The investigation report and Shelley Bodie's memo to Sandy Hansen were disclosed to the applicant by the District in severed form. As was the case with the letter and the emails, some of the information that has been severed by the District under s. 22 is not personal information. For example, descriptions in the investigation report of the modifications made to the hot tub to make it less noisy have been severed. This is not the personal information of the third party. It is a description of what has been done to rectify the problem that is the source of the applicant's complaint. Similarly, descriptions of how often the hot tub pump operates cannot in any way be characterized as "personal information" and should not have been severed under s. 22.

[69] Also severed from the report under s. 22 are some of Shelley Bodie's own statements that she apparently made to the applicant during her investigation; some of her opinions about the applicant's and the third party's willingness (or not) to work cooperatively toward a solution; and notes on her discussions with Sandy Hansen about the complaint. It is true that, in some of these instances, what has been severed is personal information—that of Shelley Bodie. However, the District has not claimed that it is severing the records of Ms. Bodie's personal information on the basis of s. 22; it has claimed that it is severing the personal information of the third party.

[70] In any event, and regardless of the District's claims, any personal information of Ms. Bodie that is contained in the records is all information that is directly related to her investigation of the complaint and was compiled in the course of her fulfilling her function as a Bylaw Enforcement Officer for the District. Whether or not any of it specifically falls under s. 22(4)(e)[32]—a point not addressed by any of the parties—the circumstances are such that disclosure of this personal information would not constitute an unreasonable invasion of third party privacy and the District is not required by s. 22(1) to sever it. In particular, the applicant is the person who made the complaint about his neighbour. He knows many of the specifics of the investigation, including Ms. Bodie's views about the situation, because, according to the investigation report, Ms. Bodie discussed them with him as part of her attempts to resolve the complaint and smooth the conflict between the third party and the applicant.

[71] There is some information contained in the investigation report and in Shelley Bodie's memo that is strictly personal information of the third party. This includes, for example, the name and telephone number of the third party, information about his work hours, personal feelings of the third party which do not relate to the applicant, and other matters. As previously noted, this information was supplied to Ms. Bodie in confidence by the third party and I find that to be a relevant factor that weighs against disclosure of it to the applicant. With respect to this personal information, I find that the presumption against disclosure has not been rebutted and the District is required by s. 22(1) to refuse the applicant access to it.

4.0 CONCLUSION

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

1. I find that the District is authorized by s. 13(1) to refuse access to the memorandum which comprises pages 19 and 20 of the records, and I confirm its decision to refuse access, with the exception of those portions indicated on the highlighted copy provided to the District, and I require the District to give the applicant access to those parts.

2. I find that the District is not authorized by s. 12(3)(b) to refuse the applicant access to the minutes which comprise page 21 of the records, and I require the District to give the applicant access.

3. I find that the District is required by s. 22(1) to refuse the applicant access to the name, telephone number and other personal information which is strictly that of the third party contained in pages 2-16 of the records, and, subject to paragraph 4, I require the District to continue to refuse the applicant access.

[32] Section 22(4)(e) deems a disclosure of personal information not to be an unreasonable invasion of third party personal privacy if…"the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body…".

4. I require the District to give the applicant access to pages 2-16 of the records, severed of third party personal information in accordance with paragraph 3, as indicated in the highlighted copy provided to the District.

January 29, 2007

ORIGINAL SIGNED BY

Justine Austin-Olsen
Adjudicator

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