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Order F12-12

MINISTRY OF JUSTICE

Catherine Boies Parker, Adjudicator

August 23, 2012

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Summary: The applicant requested video recordings relating to the time that she was detained at the Vancouver City Jail. On judicial review of a previous order in which some recordings were ordered released with some redactions, the Supreme Court of British Columbia held that the facial image of a Correctional Officer in the recording was third party personal information and remitted back to the Commissioner the question of whether the release of that information would constitute an unreasonable invasion of the third party's privacy. The applicant made no submissions on the remittal. The applicant has not met the burden of showing that the release of the information would not constitute an unreasonable invasion of the third party's privacy.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(2), 22(3) and 22(4).

Authorities Considered: B.C.: Order F08-13, [2008] B.C.I.P.C.D. No. 28; Decision F10-04, [2010] B.C.I.P.C.D. No. 16; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order F08-04, [2008] B.C.I.P.C.D. No. 7; Order No. 97-1996, [1996] B.C.I.P.C.D. No. 23; Order F10-21, [2010] B.C.I.P.C.D. No. 32; Order F09-15, [2009] B.C.I.P.C.D. No. 20; Order 02-56, [2002] B.C.I.P.C.D. No. 58; Order 01-07, [2001] B.C.I.P.C.D. No. 7; Order 01-37, [2001] B.C.I.P.C.D. No. 38.

Cases Considered: *British Columbia (Public Safety and Solicitor General) v. Stelmack* 2011 BCSC 1244; *Architectural Institute of B.C. v. Information and Privacy Commissioner for B.C.*, 2004 BCSC 217.

INTRODUCTION

[1] This decision involves the applicant's request for video footage taken during her incarceration at Vancouver City Jail ("VCJ"). The Ministry of Public Safety and Solicitor General[1] ("Ministry") denied that request, relying on ss. 15 and 22 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The applicant sought a review of that decision and in Order F08-13,[2] I ordered the Ministry to disclose the video recordings referred to by the parties as DVR #2 and DVR #3 to the applicant, with some information in those DVRs redacted.

[2] The Ministry and one of the correctional officers ("Correctional Officer"), whose image was contained in DVR #2 filed applications for judicial review of that decision. The applications alleged errors in the interpretation and application of ss. 4, 15, 19 and 22 of FIPPA. The Court upheld the decision in Order F08-13, with the exception of the portion that considered the application of s. 22 to the Correctional Officer's image in DVR #2.[3] The Court ordered that the interpretation and application of s. 22 to the Correctional Officer's facial image be remitted to the Commissioner for determination on an expedited basis. The Court ordered:

> The interpretation and application of s. 22 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") in Order F08-13 as regards disclosure of [the Correctional Officer's] facial image, and the application of the burden of proof under s. 57(2) in that analysis, are remitted to the Commissioner for determination on an expedited basis and in keeping with this Court's reasons.

[3] This is the decision on that remittal.

[4] The Court also ordered the Ministry to release DVRs #2 and #3 to the applicant, with certain redactions, including the blurring of the Correctional Officer's facial image in DVR #2. The applicant has now received a copy of the DVR at issue, with the Correctional Officer's facial image blurred. That DVR consists of a recording of the inside of a jail cell in which the applicant was being held. The Correctional Officer appears on the recording in the course of carrying out her employment duties at the VCJ. The only question before me is whether the applicant has discharged her burden to demonstrate that the release of the Correctional Officer's facial image on DVR #2 would not be an unreasonable invasion of her privacy.

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[1] The name of the public body at the time of the original Order was the Ministry of Public Safety and Solicitor General. The name of the public body was changed to Ministry of Justice effective February 8, 2012.
[2] [2008] B.C.I.P.C.D. No. 21.
[3] *British Columbia (Public Safety and Solicitor General) v. Stelmack* 2011 BCSC 1244.

[5] **The Remittal**—The Commissioner delegated the re-determination of this issue to me. I wrote to the parties and stated that I was prepared to accept additional submissions, and set out a schedule for the exchange of submissions. My letter stated, in part:

> Justice Russell found that s. 22 of FIPPA requires the images to be withheld unless the applicant can demonstrate that disclosure of [the applicant's] image is not an unreasonable invasion of [the Correctional Officer's] privacy. Justice Russell directed that all of the relevant circumstances listed under s. 22(2), and all relevant disclosure exceptions under s. 22(3) should be considered. She also stated that the Commissioner should explain the interaction between the relevant parts of s. 22(2), s. 22(3) and s. 22(4). Justice Russell left it to the Commissioner to determine whether the parties will be able to make additional submissions on this issue.
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> Because the relevant issues with respect to s. 22 have been articulated by Justice Russell in a manner not previously addressed by the parties, it is appropriate for each party to have an opportunity to provide submissions on the matters which the court directed the Commissioner to consider. These will be considered along with the evidence and arguments previously received in the Inquiry prior to the issuance of Order F08-13.
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> In Ms. Billo's letter of November 24, 2011, she asked whether the parties were permitted to provide both affidavit evidence and argument as part of their submissions. Relevant evidence would only be that which is directed to the specific question of whether s. 22 requires the public body to withhold [the Correctional Officer's] image on the basis that its disclosure would be an unreasonable invasion of [the Correctional Officer's] personal privacy, as now articulated by the court. If there is any evidence relevant to this particular issue that a party wishes to provide, I will consider whether it is appropriate to receive it.

[6] The letter set out a deadline for submissions and additional evidence, and asked that parties submit any *in camera* materials one week earlier. It also set out the deadline for reply submissions. Counsel for the Correctional Officer asked for additional time to prepare submissions and, as a result, the deadline for submissions was extended. Counsel for the Correctional Officer provided an initial submission and affidavit. The public body took no position, but reserved the right to reply to factual material in the submissions of other parties. The applicant provided no submissions. Counsel for the Correctional Officer also provided a brief reply submission.

[7] **The Position of the Applicant**—Order F08-13 set out the positions of the parties on the application of s. 22 to the Correctional Officer's image, as contained in their original submissions, at paras. 57-65. As noted, the applicant did not provide any additional submissions or evidence on the remittal. In her previous submissions, the applicant had argued that the release of the

Correctional Officer's image would not constitute an unreasonable invasion of the VCJ's staff's privacy, including that of the Correctional Officer. The applicant stated that the Correctional Officer was aware that her image was being captured by the video, and that she had already identified and named the Correctional Officer as a defendant in a civil action. The applicant alleged that the Correctional Officer had committed an offence and, in her opinion, the Correctional Officer had no rights "in relation to being identified as a suspect." The applicant submitted that the video footage was vital to her lawsuit, and that staff members of the jail should be held accountable for their actions. The applicant argued that release of the footage would not further jeopardize the life or physical safety of a law enforcement officer because, if someone wanted to harm such an employee, they could just follow them as they left work. The applicant asserted that any claim that an officer would be harmed was purely speculative and lacked evidentiary support. She alleged that assaults were common in the jail facility and that this raised a matter of public interest.

[8] **The Position of the Public Body**—The public body took no position on the remittal. In its earlier submissions, the public body argued that the release of the jail staff's images would not constitute an unreasonable invasion of their privacy. The public body stated:

> On the DVRs, the Staff appear in the performance of their duties, and the video merely factually report on their activities and functions at the Jail. Based on the information that the Ministry currently has, the Ministry believes that for the purposes of the records at issue in this inquiry, the disclosure of the personal information of the Staff is not an unreasonable invasion of their privacy.

[9] **The Position of the Correctional Officer**—The staff members, including the Correctional Officer, argued in their original submissions that the release of their images should be prohibited, if it would identify them. The Correctional Officer expressed concern about how the videos could be used, and that the applicant or anyone else could alter the images. The Correctional Officer argued that release of the image would be an unreasonable invasion of her privacy, but did not specify which provisions of s. 22 she was relying on.

[10] In the evidence she provided on the remittal, the Correctional Officer stated that she is currently on medical leave as a result of developing Post Traumatic Stress Disorder ("PTSD") from her duties as a correctional officer. She stated that, while she was aware of the fact that she would be videotaped in the course of carrying out some of her duties, she thought that this was done in order to protect officers carrying out their duties. She was unaware that members of the public might be able to obtain the footage. She stated that she had never consented to her image being released, and that, if the Ministry had sought her consent, she would have refused. The Correctional Officer stated that she had suffered severe assaults in the course of her duties. In addition,

she has been told of a plot to take her partner hostage and to kill the Correctional Officer in retaliation for a decision she had made in the course of her duties. She stated that "in over two decades of experience, neither I nor any of my colleagues had ever been threatened so seriously." As a result of the threats against her and her partner, her workplace implemented significant security measures and her partner was required to work in a different position. She stated that she is very concerned that, if her image is released, she will suffer significant additional stress and anxiety which are features of her medical condition. She is also concerned that, having already been singled out for violence, her safety will be at further risk if her image is released. She stated that her home has already been identified, and that if her image is released she will be at additional risk.

[11] In her submissions, the Correctional Officer stated that s. 22(2)(e) of FIPPA requires consideration of whether the third party will be exposed to other harm, and referenced the harm referred to in her affidavit. In her reply submissions, the Correctional Officer noted that the personal information at issue is related to "employment" and would show the Correctional Officer's "racial origin" and that ss. 22(3)(d) and (i) were relevant. The Correctional Officer also submitted in reply that the applicant had not met the burden of proof with respect to s. 22.

[12] In my view, the only argument properly raised in reply by the Correctional Officer, given the absence of submissions by the applicant and the public body, was that the applicant had not discharged the burden of proof. She could have and should have made arguments about s. 22(3) in her original submissions.

[13] **The Legislative Provisions**—Section 57(2) of FIPPA provides that, in an inquiry into a decision to deny an applicant access to all or part of a record that contains personal information of a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's privacy. As Justice Russell noted, the Correctional Officer's image of herself carrying out her work duties is her personal information, and it is up to the applicant to prove that its disclosure will not be an unreasonable invasion of the Correctional Officer's personal privacy.

[14] Section 22 of FIPPA provides that 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. Section 22(2) sets out the factors which must be considered in determining whether there will be an unreasonable invasion of third party privacy. The provisions of s. 22(2) which could be relevant in this case are as follows:

> 22(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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> (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,
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> …
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> (c) the personal information is relevant to a fair determination of the applicant's rights,
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> …
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> (e) the third party will be exposed unfairly to financial or other harm,
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> …
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> (g) the personal information is likely to be inaccurate or unreliable, and
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> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant

[15] Section 22(3) provides that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy in certain circumstances. The relevant portions of s. 22(3) are:

> (d) the personal information relates to employment, occupational or educational history,
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> …
>
> (i) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations,

[16] Subsection 22(4) provides that a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy in certain circumstances. The relevant part of s. 22(4) is:

> (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,

ANALYSIS

The admissibility of the new evidence on the remittal

[17] Neither the applicant nor the public body made any submissions about the admissibility of the new evidence put forward by the Correctional Officer on the remittal. I note that the Correctional Officer sought to introduce some of this same evidence on the application for judicial review. The Correctional Officer also asked the Office of the Information and Privacy Commissioner to reopen Order F08-13 in order to consider some similar evidence. In the decision on the application for reopening, the Senior Adjudicator, who considered the application, found that some of the evidence was not brought forward in a timely way. She also found that the evidence would not have affected the result in Order F08-13.[4] On the judicial review, Justice Russell found that the evidence was not related to the matters before her.

[18] In my view, once a matter has been remitted back to the Commissioner by the Court, there is more discretion in determining the admissibility of new evidence than there would be on an application for reopening. As Justice Russell noted, the failure of the Correctional Officer to put forward some of the relevant evidence may have resulted from her misunderstanding of the process on the inquiry. Given that no one has objected to the new evidence going in on the remittal, I think it is appropriate to consider it.

[19] As noted above, the Correctional Officer's affidavit on the remittal states that she is again on medical leave as a result of her PTSD, and that she does not expect to be able to return to her position. This is different evidence than what was before the Senior Adjudicator, who considered the application for a reopening. In my view, such evidence is relevant to the question of the impact on the Correctional Officer of the release of the information requested, especially with respect to the application of s. 22(2)(e). While it is true that this evidence was not in existence at the time the information was requested, or when Order F08-13 was made, it is nonetheless relevant to the analysis that the Court has required me to undertake anew. It would be artificial for the remittal to proceed as if this evidence did not exist when all parties are aware of it.

The application of s. 22

[20] Justice Russell directed that I consider all of the relevant circumstances under s. 22(2), and all relevant disclosure exceptions under s. 22(3). She also directed that I include an explanation of the interaction between the relevant parts of ss. 22(2), 22(3) and 22(4). In addition, I must have regard to the appropriate approach to s. 22 as set out in previous Orders.

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[4] Decision F10-04, [2010] B.C.I.P.C.D. No. 16.

[21] In Order 01-53,[5] former Commissioner Loukidelis set out the appropriate approach to the application of s. 22:

> [22] **3.3 How Section 22 is Applied**—When a public body is considering the application of s. 22, it must first determine whether the information in question is personal information within the Act's definition of personal information.…
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> [23] The next step in the s. 22 analysis is to determine whether disclosure of the personal information would be an unreasonable invasion of a third party's personal privacy. The public body must consider whether disclosure of the disputed information is considered, under s. 22(4) of the Act, *not* to result in an unreasonable invasion of third-party privacy. …
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> [24] Next, the public body must decide whether disclosure of the disputed information is, under s. 22(3), *presumed* to cause an unreasonable invasion of privacy. According to s. 22(2), the public body then must consider all relevant circumstances in determining whether disclosure would unreasonably invade personal privacy, including the circumstances set out in s. 22(2). The relevant circumstances may or may not rebut any presumed unreasonable invasion of privacy under s. 22(3) or lead to the conclusion that disclosure would not otherwise cause an unreasonable invasion of personal privacy. [Italics in original]

[22] With respect to the first step, Justice Russell reviewed the definition of "personal information" and case law about an individual's image and held:

> [The Correctional Officer's] image is therefore personal information which must be severed from the DVRs if failure to do so would constitute an unreasonable invasion of her privacy.

[23] It is therefore appropriate to consider whether the Correctional Officer's image falls within any of the categories in s. 22(4) of FIPPA. If it does, disclosure of the information cannot constitute an unreasonable invasion of third party privacy, and there is no need to consider ss. 22(2) and 22(3). On the other hand, if s. 22(4)(e) does not apply, it is necessary to consider whether there is a presumption that the disclosure is an unreasonable invasion of third party privacy under s. 22(3). Whether or not such a presumption applies, it may then be necessary to go on to apply the factors set out in s. 22(2).

Does s. 22(4) apply?

[24] The only relevant provision of s. 22(4) is s. 22(4)(e). If s. 22(4)(e) applies to the information, there is no need to consider the application of s. 22(2) and s. 22(3).[6] As a result, it is appropriate to consider it first.

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[5] [2001] B.C.I.P.C.D. No. 56.

[6] *Architectural Institute of British Columbia for Information and Privacy Commissioner for British Columbia* 2004 BCSC 217; Adjudication Order No. 2 (June 19, 1997).

[25] While s. 22(4)(e) provides that the release of information about a third party's "function" as an employee of a public body cannot constitute an unreasonable invasion of that third party's personal privacy, s. 22(3)(d) provides that release of information about a third party's employment history is presumed to be an unreasonable interference with third party privacy. Thus, information is treated very differently if it is about a public employee's "job functions" on the one hand, or a public employee's "employment history" on the other.

[26] I considered the relationship between these two provisions in Order F08-04.[7] There I noted that they relate to the "competing principles which animate FIPPA: the objectives of ensuring the transparency of public bodies and appropriately protecting the privacy of individuals, including those employed by public bodies." One of the ways previous orders have dealt with this tension has been to require the release of information about the activities of public employees, while requiring the withholding of information that would identify those specific employees. In Order No. 97-1996,[8] former Commissioner Flaherty stated:

> A good part of the information that SFU has severed as "employment history" is in fact descriptive of what individuals did in their workplaces on particular projects. I refer here not to the behaviour of individuals but rather to their tangible activities in the workplace, such as research projects and related activities. I find that much of this information in the report describes the "functions" of the employees and thus should be released to the applicant. My goal is to disclose such information without identifying specific individuals to the general reader, because of other privacy interests worthy of protection.

[27] Order No. 97-1996 and Order F08-04 dealt with reports of investigations into incidents in the workplace. Both orders required disclosure of information regarding the activities of employees as being within s. 22(4)(e), but found that identifying information (in those cases, names and positions) fell within s. 22(3)(d).

[28] Other orders have suggested that a third party's name, position and other identifying information will only fall within s. 22(3)(d) in certain contexts. In Order F10-21,[9] the Senior Adjudicator noted (footnotes omitted):

> [22] The next step is to decide if s. 22(4)(e) applies. Information on the name, title and remuneration (including severance) of a public body employee is normally the type of information that would fall under this section, as being associated with the individual who occupies a particular position within the public body. Information about the duties or

[7] [2008] B.C.I.P.C.D. No. 7.
[8] [1996] B.C.I.P.C.D. No. 23.
[9] [2010] B.C.I.P.C.D. No. 32.

responsibilities associated with a particular position that a given public body employee holds normally also falls under s. 22(4)(e). However, I agree with ICBC that the context in which the information in dispute appears in this case determines whether or not it falls under s. 22(4)(e) or s. 22(3)(d).

[23] In Order 01-53, Commissioner Loukidelis found that the third party's name and title, normally captured by s. 22(4)(e), were in that case part of the third party's employment history under s. 22(3)(d), but only because they appeared in the context of a workplace investigation:

> [40] I accept that the name, and other identifying information of the third party, is the third party's personal information and that it is, in this context, information that "relates to" the third party's employment history under s. 22(3)(d). The third party's name and other identifying information is covered by s. 22(3)(d) only because that information appears in the context of a workplace investigation. This is not to say that, in the ordinary course, the name or other identifying information of a public body officer, employee or member is covered by s. 22(3)(d). Moreover, even in cases such as this, where the identifying information is covered by s. 22(3)(d), any third-party identifying information that in some way relates to the third party's job duties in the normal course of work-related activities falls into s. 22(4)(e). I refer here to objective, factual statements about what the third party she did or said in the normal course of discharging her or his job duties, but not qualitative assessments or evaluations of such actions. For a similar finding, see, for example, Order 00-53, [2000] B.C.I.P.C.D. No. 57.

[29] It is clear that information identifying public body employees may fall outside of s. 22(4)(e) in cases other than those involving investigations into workplace behaviour.[10] In this case, the information is not contained in an investigation report, although the applicant certainly alleges misconduct and is seeking the DVRs in order to explore such misconduct. The applicant's own intended use of the information, however, does not determine whether it must be withheld under FIPPA. The information was produced as a result of the routine recording of the everyday operations within VCJ. It records the Correctional Officer's "tangible activities" in the normal course of work-related activities. For that reason, the disclosure of the Correctional Officer's *activities* is within s. 22(4)(e). The fact of the Correctional Officer's employment is also likely within s. 22(4)(e).

[30] However, the Correctional Officer's facial image is not information "about" her position, functions or remuneration in the workplace. Her argument on the remittal, and Justice Russell's analysis, make it clear that her concern with respect to the disclosure of her image is not limited to being identified as an employee of VCJ. There is no fast rule concerning the application of s. 22 to information that identifies an individual as an employee of a public body: it depends on the circumstances of the case. Because the Correctional Officer's

[10] See, for example, Order F11-04, [2011] B.C.I.P.C.D. No. 4.

facial image does not provide information about her functions as an employee of a public body, I find that it is not "about" her position, functions or remuneration as a public body employee and thus does not fall within s. 22(4)(e).

Does s. 22(3) apply?

[31] The next step is to determine whether any of the presumptions set out in s. 22(3) apply. Section 22(3)(d) applies to personal information that "relates to" the employment history of a third party. Previous orders have held that this provision applies to certain contents of a personnel file, the details of disciplinary action taken against employees, performance appraisals of employees and materials relating to investigations into workplace behaviour.

[32] As noted above, while s. 22(4)(e) is aimed at ensuring the accountability of public bodies, s. 22(3)(d) is meant to protect the privacy of public body employees. I note that Justice Russell found that the Correctional Officer:

> …has expressed concern about release based on security concerns she has because of the nature of her job. In this way, the harms she alleges are tied to her employment.

[33] The Correctional Officer's facial image is in the possession of the Ministry because of the circumstances of her employment with the Ministry. She is concerned about the impact of its disclosure because of specific incidents arising from her employment history with the Ministry. Consequently, in this particular case, the Correctional Officer's facial image "relates to" her employment history. There is thus a presumption that its disclosure is an unreasonable invasion of her privacy.

[34] As noted, the Correctional Officer also argued that s. 22(3)(i) applied in that the release of the Correctional Officer's facial image would reveal her ethnic origin.

[35] I have some concern about the fact that the Correctional Officer did not raise s. 22(3) in her initial submissions on the remittal, but only in her reply. While the applicant bears the burden of proof of this issue, the general expectation in this type of inquiry is that all of the parties will raise all provisions relevant to their case in their initial submissions. Raising new provisions undermines administrative fairness by depriving the other parties of their right to reply. This is of less concern with respect to s. 22(3)(d), because I think it was clear from Order F08-13, and from the reasons of Justice Russell, that this provision would be at issue on the remittal. However, as far as I am aware, no one raised s. 22(3)(i) before the applicant made reply submissions on the remittal.

[36] Nevertheless, I cannot disregard the possible application of s. 22(3)(i) (or any other relevant provision) simply because none of the parties raised it. The reasons for this are because s. 22 is a mandatory exception, and Justice Russell provided specific direction to me to consider "all relevant disclosure exceptions under s. 22(3)." If I had found that this provision might be determinative of the issue before me, however, I would have provided the applicant with an opportunity to respond to the arguments the Correctional Officer raised.

[37] Given the structure of s. 22, it is not necessary for me to decide whether s. 22(3)(i) applies. This is because I have determined that s. 22(3)(d) applies, which means that there is already a presumption that the disclosure constitutes an unreasonable invasion of privacy. Moreover, I find below that, even were I only to apply the factors set out in s. 22(2), I would have found that the applicant has not discharged her burden to show that disclosure of the Correctional Officer's facial image would not constitute an unreasonable invasion of her privacy in the particular circumstances of this case.

The application of the s. 22(2) factors

[38] With respect to s. 22(2)(a), it is clearly desirable to hold the Ministry accountable for alleged assaults occurring at the VCJ. In many circumstances, it may be that disclosure of the identity of employees of a public body who are alleged to have committed certain acts will allow for a more thorough and searching review of the activities of the public body itself, and would promote transparency. For these reasons, in Order F08-13, I held that s. 22(2)(a) favoured disclosure. However, I note that s. 22(2)(a) relates to scrutiny of a public body rather than its individual employees. While I find that it is essential that the activities of the Correctional Officer be disclosed, in this case, it is not clear how disclosure of the facial image will promote public scrutiny of the Ministry. This is especially the case given that the applicant is aware of the Correctional Officer's identity. For this reason, s. 22(2)(a) favours disclosure only minimally, if at all.

[39] I now turn to the application of s. 22(2)(c). The test for applying this provision is set out in numerous Orders including Order 01-07:[11]

> [31] 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:
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> 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;

[11] [2001] B.C.I.P.C.D. No. 7.

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.

[32] 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] In Order F08-13, I stated that s. 22(2)(c) also favoured disclosure. However, as Justice Russell pointed out in her reasons, the applicant has another avenue of access to unsevered copies of the DVRs through the rules of disclosure in civil proceedings. While the applicant asserted in her initial submissions that disclosure is vital to her civil proceeding, she did not, on the remittal, refute Justice Russell's suggestion that there are other avenues available to her to obtain disclosure for that purpose. In addition, the identity of the Correctional Officer is well known to her and not in dispute. Therefore, I find that further disclosure of the facial image of the Correctional Officer will not affect the determination of the applicant's rights. As a result, s. 22(2)(c) does not favour disclosure.

[41] I now turn to the application of s. 22(2)(e). In Order 01-37,[12] former Commissioner Loukidelis found that "harm" for the purpose of s. 22(2)(e) can consist of serious mental distress, anguish or harassment. Given the Correctional Officer's specific circumstances, including her ongoing medical condition and the history of threats being made against her based on her employment, I conclude that disclosing her image in this context would expose her to harm, including serious mental stress. Given the vulnerability associated with the Correctional Officer's medical condition, I find that such harm could be "unfair". As noted, the applicant argued that the Correctional Officer was aware of the cameras and that she was being recorded. But, as noted by Justice Russell, the Correctional Officer did not waive all rights to her image. Therefore, I find that s. 22(2)(e) weighs heavily against disclosure.

[42] None of the other provisions of s. 22(2) would favour disclosure. On balance, I find that the application of the factors set out in s. 22(2) leads to the conclusion that disclosure of the Correctional Officer's facial image in this case would be an unreasonable invasion of her privacy.

[12] [2001] B.C.I.P.C.D. No. 38.

CONCLUSION

[43] Justice Russell found that the privacy interest of the Correctional Officer in her own image was not limited to the fact that it would identify her as an employee of the public body, but that her concerns about the release of the information were tied to her employment. The applicant bears the burden of establishing the disclosure of the Correctional Officer's facial image would not constitute an unreasonable invasion of her personal privacy in this case. The applicant made no submissions on the remittal.

[44] I find that in the circumstances of this case, the Correctional Officer's facial image is not information about her position, functions or remuneration as an employee of a public body. It is, however, information which "relates to" her employment history and, as a result, there is a presumption that its disclosure will constitute an unreasonable invasion of her privacy. I also find that the relevant factors, particularly s. 22(2)(e), favour withholding the image. The applicant has failed to meet the burden of proving that disclosure would not be an unreasonable invasion of the Correctional Officer's personal privacy. As a result, I find that the release of the Correctional Officer's image would constitute an unreasonable invasion of her personal privacy.

[45] Because the public body has already released to the applicant a copy of the DVR with the facial image of the Correctional Officer redacted, in accordance with the order of Justice Russell, it is not necessary for me to make an order.

August 23, 2012

ORIGINAL SIGNED BY

Catherine Boies Parker
Adjudicator

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