



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

Order F10-05

**INSURANCE CORPORATION OF BRITISH COLUMBIA**

Celia Francis, Senior Adjudicator

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**Summary:** The applicant, a journalist, sought disclosure of “bonuses paid to ICBC executives” during a specified period. ICBC refused under s. 22, saying this would unreasonably invade the employees’ privacy because the bonus amounts were essentially evaluations of the employees’ performance. ICBC is not required to withhold this information. It is information “about the...remuneration” of the employees and therefore s. 22(4)(e) provides that its disclosure would not be an “unreasonable invasion” of the employees’ “personal privacy”. The desirability of public scrutiny outweighs any presumed unreasonable invasion of personal privacy on the basis that the information was about employment history or performance.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, s. 22(4)(e), 22(3)(d); *Financial Information Act*, ss. 2(1), (2) and (3); Financial Information Regulation 371/93, s. 6 of Schedule 1.

**Authorities Considered:** **B.C.:** Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-56, [2002] B.C.I.P.C.D. No. 58; Order No. 24-1994, [1994] B.C.I.P.C.D. No. 27; Order No. 75-1996, [1996] B.C.I.P.C.D. No. 1; Order No.173-1997, [1997] B.C.I.P.C.D. No. 34; Order 01-46 [2001] B.C.I.P.C.D. No. 48; Order F09-08, [2009] B.C.I.P.C.D. No. 11; Order F09-15, [2009] B.C.I.P.C.D. No. 20; Order F08-16, [2008] B.C.I.P.C.D. No. 28; Order 03-34, [2003] B.C.I.P.C.D. No. 34; Order 02-36, [2002] B.C.I.P.C.D. No. 36; Order F06-06, [2006] B.C.I.P.C.D. No. 11; Order F05-14, [2005] B.C.I.P.C.D. No. 16; Order F07-10, [2007] B.C.I.P.C.D. No. 15. **Ont.:** Order PO-2641, [2008] O.I.P.C. No. 23; Order PO-1885, [2001] O.I.P.C. No. 59; Order PO-2536, 2006 CanLII 50875 (ON I.P.C.). **Alta:** Order F2008-010, [2008] A.I.P.C.D. No. 36.

**Cases Considered:** *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 37.

## 1.0 INTRODUCTION

[1] This order arises out of the applicant's request to the Insurance Corporation of British Columbia ("ICBC"), under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), for disclosure of the "bonuses paid to ICBC executives from Jan. 1, 2005 to the present day, each named one described separately". The applicant referred to himself as "a low budget reporter working for the public and educational interest" and asked that ICBC apply s. 25 of FIPPA, which is a public-interest disclosure provision, "to override exemptions and excuse fees".

[2] ICBC responded first by saying this:

A performance pay amount is a direct reflection of an individual's level of performance against measures and targets. This amount is essentially an evaluation of the individual's performance which forms part of his/her employment history.

[3] ICBC then said it was denying access to information about executive bonuses under ss. 22(1) and 22(3)(d). It told the applicant that information about total amounts paid to executives in 2005 was available on its website and that figures respecting total amounts for 2006 would be available soon.

[4] The applicant requested a review by this office of ICBC's decision to deny access. He asked for an order requiring ICBC to release the detailed figures and also asked that s. 25 be applied, adding this:

... There are many examples of Canadian governments releasing just such bonus figures, with FOI requests and without.

ICBC has said it will not release these figures — which it had done in years past — just because it doesn't like the way the media report on the numbers. That excuse is obviously not an exemption in the FOIPP Act. It is deeply regrettable that ICBC would waste time and taxpayer's money on such a hopeless effort.

[5] Mediation was unsuccessful and an inquiry was held under Part 5 of FIPPA.

## 2.0 ISSUES

[6] The notice of inquiry states that the issues in this case are:

1. Whether ICBC is required to refuse access to the requested information under s. 22(3)(d) of FIPPA or whether s. 22(4)(e) of FIPPA applies to the requested information.

2. The applicant's assertion that s. 25 requires disclosure of the requested information in the public interest,

[7] Under s. 57(2) of FIPPA, the applicant has the burden to show that disclosure of the personal information would not, within the meaning of s. 22, unreasonably invade third-party personal privacy. Because s. 57 is silent with respect to whether s. 25 applies, both parties ought to provide evidence and argument about whether s. 25 requires disclosure.

### 3.0 DISCUSSION

[8] **3.1 Public Interest Override**—The relevant parts of s. 25 read as follows:

#### **Information must be disclosed if in the public interest**

25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

- (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
- (b) the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

[9] Section 25 has been the subject of many orders.<sup>1</sup> I have applied, without repeating them, the principles for considering s. 25 as set out in those orders.

[10] The applicant argues that bonuses paid to ICBC executives are "taxpayers' money" and that if "ICBC succeeds in keeping bonuses private, other public bodies might begin doing the same."<sup>2</sup> The applicant also provides extracts from media articles on this topic. One article says that "a majority of executives" were paid bonuses for "satisfactorily" doing their jobs during a time when a "controversial audit" found "widespread administrative foul-ups in the handling of seven job creation programs".<sup>3</sup> Extracts from other media articles revealed details of the dollar amounts in bonuses, severances and salaries that named executives had received.<sup>4</sup>

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<sup>1</sup> For example, Order 02-38, [2002] B.C.I.P.C.D. No. 38, and Order 01-20, [2001] B.C.I.P.C.D. No. 21.

<sup>2</sup> Pages 1-2, initial submission.

<sup>3</sup> The applicant gave the following citation for this article: "HRDC bosses received bonuses despite waste"; Nanaimo Daily News, Nanaimo, BC, January 28, 2000, p. A9.

<sup>4</sup> The applicant gave the following citations for these items: an August 23, 2007 media release by the British Columbia Lottery Corporation on the severance agreement it struck with its former president and CEO; a December 14, 2006 article on the same topic in The Georgia Straight, "Lottery honcho wins sweepstakes; a July 31, 2002 article on a city manager's contract, "Ousted city manager received performance bonus", Stoney Creek News, Stoney Creek, ON; an October 23, 1998 article on the employment agreement for Ontario Hydro's president,

[11] ICBC describes s. 25 as “an exceptional provision”, which requires disclosure in the “limited and extraordinary circumstances” set out in the section. It says previous orders have shown that s. 25 “sets a very high triggering threshold and only applies in exceptional or unique circumstances where there is an urgent and compelling need for compulsory public disclosure” regardless of FIPPA exceptions to disclosure. Section 25 does not, in ICBC’s view, “compel disclosure about all matters that may be of public concern, interest or debate”.<sup>5</sup> ICBC acknowledged that some members of the public may be interested in knowing how much performance pay ICBC’s executives have received but it does not believe that any exceptional, urgent or compelling reasons apply to require immediate disclosure of this information. ICBC argued that s. 25 therefore does not apply here.<sup>6</sup>

[12] The public may be interested in finding out how much ICBC executives receive in performance pay, but this is not the test s. 25 sets. At the very least, there are no urgent or compelling reasons in this case which require disclosure of the requested information “without delay”, as s. 25 requires. I find that s. 25(1)(b) does not apply here.

[13] **3.2 Third-Party Personal Privacy**—Many orders have considered the application of s. 22<sup>7</sup> and I will apply without repeating them the principles set out in those orders. The relevant parts of s. 22 read as follows:

**Disclosure harmful to personal privacy**

- 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s personal privacy.
- (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party’s personal privacy, the head of a public body must consider all the relevant circumstances, including whether
- (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny, ...
  - (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

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“Hydro bigwig earned more than \$1 million”, Standard, St. Catharines, ON; an article of September 28, 2000 in the Regina Leader Post on the expenses and pay of the president of the Royal Canadian Mint, “Mint boss gets more than \$1M in pay, expenses”.

<sup>5</sup> Para. 27, initial submission.

<sup>6</sup> Para. 29, initial submission.

<sup>7</sup> See, for example, Order 01-53, [2001] B.C.I.P.C.D. No. 56, and Order 02-56, [2002] B.C.I.P.C.D. No. 58.

- (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if ...
  - (d) the personal information relates to employment, occupational or educational history, ...
  - (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,
- (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if ...
  - (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff, ... .

[14] The following definitions from Schedule 1 of FIPPA are also relevant:

**“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; ...

**“personal information”** means recorded information about an identifiable individual other than contact information.

[15] ICBC says the requested information is third-party personal information because it is recorded information about identifiable individuals that is not “contact information”. The applicant did not comment on this aspect of s. 22. There is no doubt that the dollar amount of performance or ‘bonus’ pay paid to an individual is third-party “personal information” as defined in Schedule 1 of FIPPA.

[16] ICBC argues that ss. 22(3)(d) and (g) apply in this case and that no relevant circumstances favour disclosure. The applicant asserts that bonuses are often given out for reasons that have nothing to do with merit, such as “personal favouritism, political or social allegiance”. In his view, the bonus information should be disclosed “as it is taxpayers’ money”.<sup>8</sup>

### ***ICBC’s Performance Management System***

[17] For this inquiry, ICBC submitted, on an *in camera* basis, a document setting out the information in dispute, by job title, for the “2005-2006 performance years”.<sup>9</sup> ICBC said that, during 2006, the “ICBC Executive” ranks comprised these positions: Chief Executive Officer; Chief Operating Officer; Chief Financial Officer; Senior Vice President, Insurance Marketing and Underwriting; Vice President, Information Services; and Vice President of Human Resources and Corporate Law.<sup>10</sup>

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<sup>8</sup> Page 1, initial submission.

<sup>9</sup> Letter of December 10, 2007.

<sup>10</sup> Para. 10, initial submission.

[18] ICBC also provided background information on its governance and “performance management system”, with the support of affidavit evidence from Len Posyniak, ICBC’s Vice President of Human Resources (whom ICBC identified as one of the affected executives). The Posyniak evidence merits quotation at considerable length:

8. The base salary of the CEO and the members of ICBC’s Executive is set by the Board of Directors and is subject to review and approval by government. The Board of Directors and the government use data from external compensation consultants to assist them in determining base salary. The base salary of the remaining Management Group Employees is determined by ICBC’s Executive and the other Vice Presidents based on policy and salary budgets set by ICBC’s Board of Directors.

9. All regular full-time or part-time Management Group Employees are eligible for performance pay. Performance pay is a form of variable pay which is dependent on the achievement of ICBC corporate, divisional and individual goals and objectives in a given year. Management Group Employees do not apply for performance pay. As will be seen, performance pay is an integral outcome of how ICBC measures a Management Group Employee’s work performance.

10. ICBC’s performance management system is designed to align ICBC’s business plans and employees with the achievement of corporate goals. It is ICBC’s Management Group Employee evaluation or appraisal process.

11. Performance pay is directly linked to annual performance plans established for each Management Group Employee and pay is based upon three components relating to each of corporate, divisional and individual objectives. Corporate performance rating is determined by the Board of Directors based on corporate targets set by the Board at the beginning of the performance year. Divisional performance rating is determined by the President and CEO and the respective Division leaders based on divisional targets set at the beginning of the performance year. Individual performance rating is determined by managers based on individual objectives that are set at the beginning of the performance year.

12. Establishing corporate, divisional and individual objectives is a three step process. First, the Board of Directors and ICBC’s Executives develop corporate business objectives to achieve ICBC’s corporate goals. Next, each of ICBC’s divisions develops business objectives that support ICBC’s achievement of the corporate goals. The members of the Executive

are accountable for performance of the corporate and divisional objectives and also each have personal performance objectives that support those goals. For all other Management Group Employees, annual performance plans are developed by the employee in consultation with his or her manager and include individual objectives which support the achievement of the divisional and corporate directives as well as their performance in respect to the core responsibilities of their position and the employee's demonstration of required competencies (behaviour).

13. Each Management Group Employee meets with his or her manager every three months to review the employee's progress as it relates to his or her annual performance plan. Each Management Group Employee must, over the course of the year, record his or her achievement of objectives, completion of core responsibilities and demonstration of required competencies, as provided for in his or her annual performance plan. After December 31, each employee is assessed on the achievement of the objectives set out in the employee's performance plan and given a numerical score. ICBC reviews the ratings to ensure consistency and to ensure that collectively the ratings fall into a distribution typical of companies that use performance management and performance driven pay systems.

14. Performance is measured on a calendar basis from January 1<sup>st</sup> to December 31<sup>st</sup> of each year. Corporate and Divisional performance results are finalized after the corporate year-end financial statement has been audited and approved. This typically occurs at the end of February each year. Performance pay is then determined and paid out at the end of March.

15. In general terms, Management Group Employee performance plans list specific objectives in point form as well as measures/outcomes in point form in each of the areas relating to identified core responsibilities, key objectives and competencies, with percentage weightings attached to each area. It also sets out individual competencies, again with percentage weightings for different identified competences. For example, a Manager's performance plan would typically measure competencies in areas such as leadership of people, action orientation, change management and relationship management with a percentage ranking of 50% for leadership and action orientation and 50% for the remaining competencies. The performance plan is linked to a developmental plan which addresses individual career objectives and identifies, for example, what additional knowledge, experiences and skills would help the employee become more effective. It contains planned activities with target dates and support requirements. The performance log portion contains the employee's recording of accomplishments and the employee's manager's comments. The quarterly review portions indicate for each quarter if the employee is on track with respect to performance plan objectives and targets, and contains the employee's manager's feedback on employee progress and performance. All of this information, including the calculation of the employee's performance pay, is contained in the individual employee's human resource file in ICBC's Human Resource Information System.

ICBC considers all of this information to be information about the employee's work history and job performance.

16. Performance pay is paid to Management Group Employees based on the degree of performance success in the achievement of corporate, divisional and individual objectives as set out in each Management Group Employee's annual performance plan. A low individual rating would typically result in no or minimal performance pay and this would in turn reflect less than optimal work performance which, if consistent over a period of time, may result in dismissal.

17. Payout of performance pay for each of the three Corporate, Divisional and Individual components are [*sic*] not dependent on each other. The ultimate performance pay figure for each individual is expressed in terms of a percentage of that individual's regular salary.

18. The *Financial Information Act* applies to ICBC. Among other things, the *Financial Information Regulation* made under that Act requires ICBC to provide each Management Group Employee's total remuneration figure. That figure is then published in the government's *Statement and Schedules of Financial Information* (Blue Book). The total remuneration figure that is published in the Blue Book is the aggregate of the Management Group Employee's base salary, paid out vacation and performance pay.

19. As noted, performance pay reflects an evaluation of an employee's performance of his or her job duties against measures and targets. As an evaluation tool reflecting job performance, ICBC believes it forms part of the employee's employment history. Disclosure of the specific amount of performance pay would be construed to reflect ICBC's assessment of that employee's performance, allowing inferences to be drawn mistakenly or accurately - that (for example) ICBC had concerns about a particular employee's work performance. ICBC's view is that disclosure of this type of information would therefore give rise to an unreasonable and unjustified invasion of the employee's personal privacy.

20. This is well illustrated by way of example. For the 2005 performance year, performance pay was paid out at the end of March 2006 and formed part of the employee's 2006 total remuneration figure. ... [two sentences submitted *in camera*]. Additionally, because performance pay is expressed in percentage terms based on a individual's base salary and also takes into account corporate and divisional rankings, comparisons in performance pay amounts between employees can create an erroneous impression that employees with the highest performance pay figures are viewed by ICBC as the best performers and vice versa.

21. In 2006, and in response to an Information Request from the British Columbia Utilities Commission (BCUC) which regulates ICBC's activities relating to its administration of universal compulsory automobile insurance, ICBC disclosed to the BCUC the base salary, performance pay and total remunerations amounts paid out to each of ICBC's executives for the 2005



performance year. ICBC subsequently advised the BCUC (in July 2007) that it was in error in doing so given the requirements of s. 22 and Part 3 of FIPPA and given that all that it was statutorily required to provide was the total remuneration figure for each of the members of the Executive (consistent with the Financial Information Act). On this basis, ICBC subsequently declined to provide BCUC with a remuneration breakdown which indicated the 2006 performance pay amounts.

***Is this information “about...remuneration”?***

[19] As previous orders affirm, analysis of the s. 22 issue requires consideration of whether disclosure of personal information in dispute “is not an unreasonable invasion of a third party’s personal privacy” because the information falls within one of the paragraphs of s. 22(4). Section 22(4)(e) provides that “a disclosure of personal information is not an unreasonable invasion of a third party’s 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 or as a member of a minister’s staff”. Accordingly, if s. 22(4)(e) applies to the information in dispute here, s. 22(1) does not require ICBC to refuse its disclosure.

[20] ICBC addresses s. 22(4)(e), but the applicant does not do so expressly. As noted above, however, he argues that bonuses are taxpayers’ money and suggests that they “are often given out for many reasons unrelated to merit”. He adds that there is no exception that allows public bodies to withhold information on the grounds that the public might misinterpret it or because it might cause embarrassment or resentment. Withholding bonus information would set a dangerous precedent, he argues, and might lead to the withholding of information on expenses as well.<sup>11</sup>

[21] ICBC acknowledges that its executives are officers or employees of a public body within the meaning of s. 22(4)(e). It argues that the issue here is whether “remuneration” refers to the “various financial elements of a public body employee’s remuneration” or to the total amount of a public body employee’s compensation.<sup>12</sup> In ICBC’s view, “remuneration” should not be “so broadly construed” as to require disclosure of the “performance-based individualized component of an ICBC Management Group Employee’s total remuneration”.<sup>13</sup>

[22] ICBC notes that one of FIPPA’s “overarching purposes” is to protect personal privacy through the creation of the exception to disclosure in s. 22. This is balanced, ICBC argues, against the interest of making public bodies more accountable to the public.<sup>14</sup>

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<sup>11</sup> Initial submission; reply submission.

<sup>12</sup> Para. 36, initial submission.

<sup>13</sup> Para. 34, initial submission.

<sup>14</sup> ICB refers here to *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 45-47 and 65-67.

[23] ICBC says it is covered by the *Financial Information Act* because ICBC is a public body under the *Financial Administration Act*. It notes that the Financial Information Regulation<sup>15</sup> requires ICBC to prepare statements and schedules of financial information in accordance with ss. 2(2) and (3) of the *Financial Information Act*, including “a schedule showing remuneration and expenses paid to or on behalf of each employee, as required by section 6” of Schedule 1 of the Regulation.<sup>16</sup>

[24] Section 2 of the *Financial Information Act* reads as follows:

**Statement of financial information**

- 2(1) A corporation must prepare statements of financial information in accordance with this section in a form and containing information prescribed by the Lieutenant Governor in Council.
- (2) Within 3 months after the end of each fiscal year of a corporation, it must prepare a statement of financial information for that fiscal year that includes the following:
- (a) a statement of assets and liabilities;
  - (b) an operational statement;
  - (c) a schedule of debts;
  - (d) a schedule of guarantee and indemnity agreements.
- (3) Within 6 months after the end of each fiscal year of a corporation, it must prepare a statement of financial information for that fiscal year that includes the following:
- (a) a schedule showing
    - (i) in respect of each employee earning more than a prescribed amount, the total remuneration paid to the employee and total amount paid for the employee’s expenses, and
    - (ii) a consolidated total of all remuneration paid to all other employees;
  - (b) a schedule showing
    - (i) the total amount paid to each supplier of goods or services during the fiscal year that is greater than a prescribed amount, and
    - (ii) a consolidated total of all other payments made to suppliers of goods or services during that fiscal year.

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<sup>15</sup> B.C. Regulation 371/93, deposited November 4, 1993.

<sup>16</sup> Para. 40, initial submission.

[25] Section 6 of Schedule 1 of the Financial Information Regulation reads as follows:

**Schedule showing the remuneration and expenses paid in respect of each employee**

6(1) In this section:

"compensation" means the sum of gross salary plus the value of benefits, if applicable;

"employee" includes an officer, director, commissioner, elected official or similar person employed in or appointed to a position in the corporation;

"expenses"

- (a) includes travel expenses, memberships, tuition, relocation, vehicle leases, extraordinary hiring expenses, registration fees and similar amounts paid directly to an employee, or to a third party on behalf of the employee, and which has not been included in "remuneration",
- (b) is not limited to expenses that are generally perceived as perquisites, or bestowing personal benefit, and may include expenditures required for employees to perform their job functions, and
- (c) excludes benefits of a general nature applicable to all employees pursuant to an agreement such as medical, dental, counselling, insurance and similar plans;

"notice period" means the length of time from the date on which notice of termination is given to an employee until the date on which employment will terminate;

"remuneration"

- (a) ***includes any form of salary, wages, bonuses, gratuities, taxable benefits, payment into trust or any form of income deferral paid by the corporation to the employee or on behalf of the employee during the fiscal year being reported upon, whether or not such remuneration is reported under the Income Tax Act (Canada), and***
- (b) does not include anything payable under a severance agreement;

"severance agreement" means an agreement, in respect of a severance payment made in lieu of a notice period, between an employee and employer, that may provide for one or more of the following:

- (a) a lump sum payment or periodic payments;
- (b) payment based on the employee's base salary, benefits and length of service;
- (c) compensation, except compensation in the form of an early retirement incentive plan.

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- (2) The schedule of remuneration and expenses must
    - (a) list separately, by name and position, the total amount of remuneration and the total amount of expenses paid to or on behalf of each elected official and member of the board of directors, by whatever named called, and each employee appointed by the Lieutenant Governor in Council,
    - (b) list in alphabetical order for each employee, excepting those included in the list required under paragraph (a), the name, the total amount of remuneration for each employee that exceeds \$75 000 and the total amount of expenses paid to or on behalf of that employee in the year reported,
    - (c) show, at the end of the lists required by paragraphs (a) and (b), the consolidated total of remuneration that was paid to employees when the amount of money paid to each employee was \$75 000 or less, excluding employees included in the list required by paragraph (a), and
    - (d) provide a reconciliation or explanation, at the end of the information required by paragraph (c), if the consolidated total differs from the related figure or figures in the statement required in section 3.
  - (3) ***The schedule of remuneration and expenses must not include personal information other than information regarding the name, position, function or remuneration and expenses of employees.***
  - (4) The schedule of remuneration and expenses must allocate expenses on a reasonable basis among several employees, if expenses attributable to more than one employee appear on one receipt or invoice.
  - (5) The schedule of remuneration and expenses must include amounts for employee expenses disbursed from petty cash, where significant, or local decentralized banking arrangements.
  - (6) The employer portion of Employment Insurance and Canada Pension Plan must be reported as a lump sum payment to the Receiver General for Canada.
  - (7) The schedule of remuneration and expenses must include a statement of
    - (a) the number of severance agreements, under which payment commenced during the fiscal year reported on, by the corporation in respect of its employees excluded from coverage under collective agreements of the corporation, and
    - (b) the range of equivalent months' compensation represented by those severance agreements.

- (8) If there are no agreements to report under subsection (7), this must be explained in a note to the schedule.
- (9) A copy of the statement or note referred to in subsections (7) and (8) must be sent by the corporation to
  - (a) the minister responsible for the corporation.

[bold italics added by ICBC]

[26] ICBC argues that s. 6 of the Financial Information Regulation indicates that the Legislature intended to draw a line between what is necessary to meet financial accountability and transparency objectives and what is necessary to protect the personal information of public body employees. It notes that the definition of “remuneration” in s. 6 of the Financial Information Regulation is the total compensation paid to a public body employee in a given year (except for severance payment information). The wording of s. 6(3) of the Financial Information Regulation, which requires the withholding of certain kinds of personal information is, in ICBC’s view, “strikingly similar” to the wording of s. 22(4)(e) of FIPPA. ICBC does not believe there are any compelling accountability objectives favouring an interpretation of s. 22(4)(e) that would require disclosure of the performance-based component of an employee’s total compensation. This is particularly the case here, ICBC argues, where the performance pay portion of an employee’s remuneration is “the culmination of ICBC’s appraisal and evaluation process”.<sup>17</sup>

[27] In ICBC’s view, what it terms an interpretation that would “restrict” the meaning of “remuneration” to total compensation is also more in keeping with the other “generic” terms associated with “remuneration” in s. 22(4)(e), such as “position” or “functions”, and with past interpretations of s. 22(4)(e) as not including performance assessments or evaluations and related information. Such an interpretation would, ICBC argued, also be consistent with the wording of ss. 22(3)(d) and (f) which set out types of information which are specific to an individual, rather than information associated with an individual employee’s position or functions.<sup>18</sup>

### ***Previous orders***

[28] This appears to be the first time an inquiry has dealt with whether the dollar amount of bonus or performance pay paid to public body employees is “remuneration” for the purposes of s. 22(4)(e), although orders have occasionally considered topics related to the issue under review here. For example, Order No. 24-1994<sup>19</sup> considered whether severance payments to hospital

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<sup>17</sup> Para. 41, initial submission.

<sup>18</sup> Para. 42, initial submission.

<sup>19</sup> [1994] B.C.I.P.C.D. No. 27.

officials fell under s. 22.<sup>20</sup> The Commissioner ordered the information disclosed. Order No. 75-1996<sup>21</sup> considered whether the bonus percentage information in the contract agreements between the City of Surrey and its City Manager and its General Manager, Parks and Recreation, fell under s. 17(1) of FIPPA. That information was ordered disclosed. Order No. 173-1997<sup>22</sup> resulted in an order to disclose a severance agreement between the District of Campbell River and its former fire chief, while Order 02-56<sup>23</sup> found that a public body employee's salary was included in "remuneration" for the purposes of s. 22(4)(e) and had to be disclosed.

[29] In Ontario, bonus pay has featured in more than one order. In Order PO-2641,<sup>24</sup> for example, Assistant Commissioner Brian Beamish ordered disclosure of the renewal employment agreement between McMaster University and its President. Among other things, the agreement included information on bonus payments, which the Assistant Commissioner found were not, as the President had argued, the President's "employment history". He also found these payments were not "salary", but were "benefits" for the purposes of s. 21(4)(a) of Ontario's *Freedom of Information and Protection of Privacy Act* which says this:

- 21(4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
- (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister;

[30] Assistant Commissioner Beamish noted that earlier Ontario orders interpreted the term "benefits" broadly to include entitlements that an employee receives in addition to his or her base salary,<sup>25</sup> including life, health, hospital, dental and disability coverages; sick leave, vacation, leaves of absence, termination allowance, death and pension benefits.

[31] In Ontario Order PO-1885,<sup>26</sup> information on the "performance/stay bonus"<sup>27</sup> of a president of the Royal Ontario Museum was held not to be "employment history" information. Although the particular bonus information did not fall under s. 21(4)(a) of Ontario's FIPPA, it had to be disclosed, principally on

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<sup>20</sup> At that time, hospitals were not "public bodies" covered by FIPPA. If they had been, Commissioner Flaherty said, the severance payments in issue could have been "construed as 'remuneration'" under s. 22(4)(e).

<sup>21</sup> [1996] B.C.I.P.C.D. No. 1.

<sup>22</sup> [1997] B.C.I.P.C.D. No. 34.

<sup>23</sup> [2002] B.C.I.P.C.D. No. 58; upheld on judicial review: 2004 BCSC 217.

<sup>24</sup> [2008] O.I.P.C. No. 23.

<sup>25</sup> Page 12, Order PO-2641, [2008] O.I.P.C. No. 23.

<sup>26</sup> [2001] O.I.P.C. No. 59.

<sup>27</sup> The Order did not say what this bonus signified.

the ground that disclosure was desirable for the purpose of subjecting the government and its agencies to public scrutiny.

### **Analysis**

[32] The question here is whether disclosure of “information about” a public body employee’s “remuneration” is limited under s. 22(4)(e) of FIPPA to the total the employee receives or whether the section contemplates disclosure of the individual payments the remuneration comprises.

[33] ICBC’s argument that the *Financial Information Act* exemplifies the Legislature’s intentions with respect to the publication of the remuneration of public body employees ignores the fact that it is a different Act with a different purpose. Moreover, the *Financial Information Act* does not state that it applies “despite” FIPPA and s. 2(2) of FIPPA states that FIPPA does not replace other procedures for access to information. Thus the availability of certain information under the *Financial Information Act* does not mean that disclosure under FIPPA is limited to the same information.

[34] Section 2(1) provides that one of FIPPA’s purposes is to make public bodies more accountable to the public by providing the public a right of access to records.<sup>28</sup> Another goal under s. 2(1) is to protect “personal privacy” and, in this context, s. 22 aims explicitly at preventing “unreasonable invasions of personal privacy”. Section 22(3) is a critical component of the scheme of s. 22. It specifies certain “presumed” unreasonable invasions of personal privacy. These can, of course, be rebutted if relevant circumstances, including those in s. 22(2), favour that determination.

[35] In the scheme of s. 22, the purpose of s. 22(4) is to stipulate, in a non-rebuttable way, that certain disclosures of personal information are not unreasonable invasions of personal privacy. These disclosures vary in kind. Some depend on the circumstances, e.g., whether the third party has consented to disclosure (s. 22(4)(a)); whether the third party’s safety or health is in question (s. 22(4)(b)); or whether the disclosure is for a research or statistical purpose (s. 22(4)(d)).

[36] By contrast, the bulk of the disclosures which s. 22(4) stipulates are not unreasonable invasions of personal privacy involve classes of personal information, not circumstances pertaining to disclosure of information. Sections 22(4)(e), (f) and (h)–(j) all involve, in relevant part, information about or revealing money or benefits an individual receives from a public body. These include information about remuneration, financial details of a contract with a public body, information about travel expenses and details of a discretionary

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<sup>28</sup> Consistent with this goal, s. 33.1(1)(a.1) was recently added to FIPPA, to allow public bodies to disclose personal information of the type described in s. 22(4)(e).

benefit from a public body. Consistent with the legislative goal of openness and accountability, s. 22(4) in large measure aims at ensuring that personal privacy considerations do not impede disclosure of information about how public bodies remunerate or benefit employees and others.

[37] ICBC asks me to read down the meaning of “remuneration” so that it encompasses only total amounts of remuneration. I do not agree that this interpretation is warranted because it is somehow more in keeping with the terms “position” and “functions” in s. 22(4)(e) or with s. 22(3)(d) or (f). Nor do I agree that the term “remuneration” is intended, when s. 22(4)(e) is interpreted in accordance with long-standing principles of interpretation,<sup>29</sup> to be read as if the word “total” appeared in the statute.

[38] As noted earlier, ICBC characterizes the issue as being whether s. 22(4)(e) applies to the “various financial elements of a public body employee’s remuneration” or only to the total amount of a public body employee’s compensation.<sup>30</sup> Perhaps ICBC refers to “financial elements” of remuneration in order to limit the scope of its argument, which might otherwise prevent the disclosure of particular elements of remuneration in any circumstances. The difficulty with ICBC’s position is that all of the remuneration that an employee earns can be reduced to financial terms. Whether we are talking about paid vacation, employer-provided disability coverage or extended health coverage, these kinds of earnings can be quantified financially. In the end, they are all “financial elements” of an employee’s remuneration. If ICBC is correct that the Legislature intended s. 22(4)(e) to apply only to “total” remuneration somehow quantified and defined, the Legislature intended the public’s right to know on this score to be a blunt instrument indeed. Accordingly, ICBC’s argument, which it acknowledges depends on a restrictive interpretation of “remuneration”, merits close scrutiny.

[39] FIPPA aims both to make public bodies more accountable to the public by providing the public with a right of access to records and to protect personal privacy. Section 2(1) creates no hierarchy of aspiration, yet by urging on me a restrictive interpretation of remuneration, ICBC asks me to favour the goal of privacy over that of accountability in a situation involving the spending of public body money.

[40] In any event, ICBC’s argument does not consider the context in which s. 22(4) appears. Section 22(4) stipulates what is not an unreasonable invasion of personal privacy, while s. 22(3) creates rebuttable presumptions of unreasonable invasions of personal privacy. Both clauses function in aid of the overall aim of s. 22, which is to determine whether a particular disclosure of

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<sup>29</sup> See, for example, *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 37. Such an approach is also reflected in s. 8 of the *Interpretation Act*. Also see Order 02-38, [2002] B.C.I.P.C.D. No. 38, Order F07-10, [2007] B.C.I.P.C.D. No. 15, Order F09-08, [2009] B.C.I.P.C.D. No. 11, and Order F09-15, [2009] B.C.I.P.C.D. No. 20, among others, where this principle has been applied.

<sup>30</sup> Para. 36, initial submission.



personal information “would be an unreasonable invasion of a third party’s personal privacy”. The Legislature has provided that FIPPA aims for both accountability and openness, on the one hand, and privacy on the other. But in implementing these goals, it chose in s. 22(1) to prohibit only “unreasonable” invasions of personal privacy. ICBC’s argument merely raises the question of whether the Legislature intended “remuneration” to refer only to global amounts of remuneration or to specific, itemized breakdowns. A comprehensive and expansive interpretation of “information about...remuneration” is, to my mind, more consistent with FIPPA’s goals of transparency and accountability in the expenditure of public funds on employee compensation. It also accords better with the wording in s. 22(4)(e), “information about...remuneration”, which suggests a broader reading of the term.<sup>31</sup> This is particularly the case with senior executives whose base salary may form only a part of their full compensation and whose bonus or performance pay and other inducements to perform well might otherwise remain hidden.

[41] For all these reasons, I reject ICBC’s position on s. 22(4)(e) in this case and find that disclosure of information “about” the remuneration of a public body employee includes disclosure of the individual elements that make up the “remuneration”. I find that s. 22(4)(e) applies to the information in dispute. Its disclosure is therefore not an unreasonable invasion of third-party privacy and ICBC must disclose it.

[42] **3.3 Employment History and Personnel Evaluations**—It is not technically necessary to consider whether ss. 22(3)(d) and (g) apply, given my finding above. For the sake of completeness, however, I will also consider ICBC’s arguments on these sections.

[43] ICBC said that personnel evaluations form part of an individual’s employment history and thus ss. 22(3)(d) and (g) overlap to some extent. It noted that previous orders have interpreted the term “employment history” as including a person’s work history, disciplinary action taken, past employment history and performance review or evaluation information.<sup>32</sup>

[44] ICBC said that its evidence establishes that performance pay

45. ... is the culmination of the employee performance review and appraisal process. It is a reflection of the employee’s performance in the organization from a corporate, divisional and individual perspective. Because it is a reflection of such performance, its disclosure should be presumed to give rise to an unreasonable invasion of third party personal privacy. Such information could be construed, erroneously or accurately, as an indicator that the individual employee is viewed as a poor, mediocre or high performer in the organization. Its disclosure could in some cases

<sup>31</sup> Previous orders have also stated the view that “about” has a broad meaning. See, for example, Order F08-16, [2008] B.C.I.P.C.D. No. 28, where I discussed information “about” an identifiable individual.

<sup>32</sup> Paras. 43-44, initial submission.

cause embarrassment and in other cases cause resentment within the workplace. It is precisely the type of individual-specific personal information that information and privacy legislation is designed to protect from disclosure.

[45] The applicant cast doubt on these arguments, saying FIPPA contains no exception allowing a public body to withhold information on the grounds that the public might misinterpret it. Nor, he said, does FIPPA allow for exceptions based on embarrassment or resentment. If information could be withheld on these grounds, he said, very little information would be released. One might just as well say, he argued, that an executive's salary should be withheld because lower-paid staff in the same public body might resent the executive's higher pay. Withholding bonus information would set a dangerous precedent, the applicant argued, and the next step could well be the withholding of information on expenses on the grounds that it is employment history.<sup>33</sup>

[46] As noted above, Ontario orders<sup>34</sup> have found that bonus pay is not "employment history" for the purposes of s. 21(3)(d) of the Ontario legislation. Alberta Order F2008-010<sup>35</sup> found that an individual's "salary information" was not his "employment history" for the purposes of s. 17(4)(d) of Alberta's FIPPA.

[47] Previous British Columbia orders have interpreted the term "employment history" information as including a variety of information associated with an individual's employment, including the following:

- an individual's workplace actions, workplace events, incidents and disciplinary matters involving an employee<sup>36</sup>
- an individual's workplace schedule<sup>37</sup>
- outside professional activities, past work history and leave transactions,<sup>38</sup> work experience and qualifications<sup>39</sup>
- the process for an individual's appointment as chief constable<sup>40</sup>
- reasons for leaving a job
- comments about an individual's workplace actions or behaviour in the context of a workplace complaint or discipline investigation<sup>41</sup>

[48] These orders have consistently taken the approach that "employment history", as related to an individual employee, refers to descriptive aspects of the

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<sup>33</sup> Pages 1-2, reply submission.

<sup>34</sup> See for example Order PO-2641, at p. 16, and Order PO-1885, at p. 9.

<sup>35</sup> [2008] A.I.P.C.D. No. 36, at para. 20.

<sup>36</sup> Order 01-53, at para. 32.

<sup>37</sup> Order 03-34, [2003] B.C.I.P.C.D. No. 34, at paras. 18-25.

<sup>38</sup> Order 02-36, [2002] B.C.I.P.C.D. No. 36, at paras. 14 & 16.

<sup>39</sup> Order F06-06, [2006] B.C.I.P.C.D. No. 11, at para. 28.

<sup>40</sup> Order F05-14, [2005] B.C.I.P.C.D. No. 16, at para. 21.

<sup>41</sup> Order 02-56, [2002] B.C.I.P.C.D. No. 58, at para 71.

employee's current or past work history, such as those listed just above. Orders have also on occasion found that s. 22(3)(d) applies to information about a third party's employment income. For example, Order 01-46<sup>42</sup> found that "employment history" included information about a third party's earned and lost income. Order F09-15 found that ss. 22(3)(d) and (f) applied to the employment income and severance payments of employees of a public body. I agree with ICBC that, on its face, the dollar amount of a bonus paid to a public body employee reveals something about that employee's past work history. Normally of course the issue of whether or not s. 22(3)(d) applies to information about a public body employee's compensation would not arise, because of s. 22(4)(e). For the purposes of this discussion, however, I find that s. 22(3)(d) applies to the information in dispute.

[49] However, I reject ICBC's argument that a bonus amount reveals personnel evaluation information about its executives and their individual performance. ICBC's evidence<sup>43</sup> shows that the amount of performance pay an executive receives is derived from a combined assessment of corporate, divisional and individual performance. Thus an executive's bonus payment reflects all those things, not just her or his individual performance. ICBC did not explain how an employee's total bonus pay would reveal information about an employee's individual performance and I do not otherwise see how this might be possible. I find that s. 22(3)(g) does not apply here.

[50] **3.4 Relevant Circumstances**—I will now also consider whether any relevant circumstances apply here, assuming for the purposes of discussion that ss. 22(3)(d) and (g) apply to the disputed information.

[51] Section 22(2)(a) has no application here, ICBC argued. Disclosure of the total compensation figures suffices to meet public accountability and transparency goals while also protecting individual privacy. Rather, in ICBC's view, disclosure could have the effect of unfair damage to reputations or unfair exposure to harm, as contemplated by ss. 22(2)(e) and (h), as it could lead to the erroneous or misleading public impression that an individual is a borderline employee. ICBC concluded by rejecting the applicant's argument that its prior practice of disclosing some performance pay information is a relevant circumstance favouring disclosure.<sup>44</sup>

[52] Section 22 is a mandatory exception to disclosure, ICBC said, and

47. ... it would defeat the purposes of this section to find that the release of third party personal information does not unjustifiably infringe personal privacy only because that same information may have previously been inappropriately or mistakenly disclosed.

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<sup>42</sup> [2001] B.C.I.P.C.D. No. 48.

<sup>43</sup> Paras. 12 & 15, Posyniak affidavit.

<sup>44</sup> Para. 46, initial submission.

[53] Ontario Order PO-2641 noted that

Section 21 sets out a balance between the privacy rights of individuals and the need for transparency and accountability with dealing with the monetary compensation received by public servants. ... In my view, the Legislature determined that the need for transparency and accountability for these public servants required that their privacy interests receive less protection.

[54] Ontario Assistant Commissioner Beamish expressed similar views in Order PO-2536:<sup>45</sup>

... In terms of the compensation packages given to senior government employees and senior employees of government agencies, the public interest demands that complete disclosure be made. It is disingenuous to take the position that the base salary of such executives is subject to public disclosure, but that other benefits and arrangements that supplement the base salary are private. In my view, the public interest in disclosing this type of information would, in most cases, be very compelling. These types of benefits and supplemental arrangements are of significant value to the employees that receive them and are a significant cost to the government. In determining whether the compensation paid to a particular individual is appropriate, the entire package is relevant and must be disclosed.

[55] I agree with these sentiments and consider that the accountability purposes of FIPPA strongly favour disclosure of the individual elements making up a public body employee's compensation, particularly those of a public body's senior executives who set corporate direction for the public body and who are ultimately responsible for its performance.<sup>46</sup> In my view, the factor in s. 22(2)(a) alone rebuts any presumed invasion of privacy in ss. 22(3)(d) and (g).

[56] I also reject ICBC's arguments that disclosure of bonus pay could be misinterpreted, including for the reasons it submitted on an *in camera* basis, resulting in unfair harm under ss. 22(2)(e) and (h). Disclosure of the elements making up remuneration may result in some discomfort to senior executives and may also result in media attention, but this does not equate to harm for the purposes of ss. 22(2)(e) and (h).<sup>47</sup> Moreover, knowledge of the way in which the bonus is calculated, plus additional explanation, as appropriate in a given case, would ensure that the information is not misinterpreted in the way ICBC suggests.

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<sup>45</sup> 2006 CanLII 50875 (ON I.P.C.), at p. 36.

<sup>46</sup> I also note that Order F09-15 said that TransLink's past practice of disclosing salary information of excluded employees was a relevant circumstance in finding that s. 22(2)(a) applied in that case.

<sup>47</sup> See p. 11 of Ontario Order PO-1885 for similar remarks.

**Conclusion on s. 22(1)**

[57] For the reasons discussed above, I find that s. 22(3)(d) applies to the information in dispute and that s. 22(3)(g) does not. I find that in any case disclosure of the requested information would not result in harm for the purposes of ss. 22(2)(e) and (h) and that the public scrutiny factor in s. 22(2)(a) rebuts any presumed invasion of privacy under s. 22(3). Section 22(1) does not therefore apply to the information in dispute.

**4.0 CONCLUSION**

[58] For the reasons discussed above, I make the following orders under s. 58 of FIPPA:

1. I require ICBC to give the applicant access to the information it withheld under s. 22.
2. I require ICBC to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines “day”, that is, on or before April 1, 2010 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the record containing the information in dispute.

February 18, 2010

**ORIGINAL SIGNED BY**

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Celia Francis  
Senior Adjudicator