



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

Order F10-21

INSURANCE CORPORATION OF BRITISH COLUMBIA

Celia Francis, Senior Adjudicator

June 10, 2010

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Summary: Three applicants requested access to records related to termination of employees, severance paid and discipline imposed following an investigation by PricewaterhouseCoopers into ICBC's Material Damage Training and Research Facility. An affected third party requested a review of ICBC's decision to disclose severed records related to him. ICBC's proposed application of s. 22 found to be correct except for amount of third party's severance which is ordered disclosed for public scrutiny reasons.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(a), (b), (e) & (h), 22(3)(d), 22(4)(e).

Authorities Considered: **B.C.:** Order 01-53, [2001] B.C.I.P.C.D. No. 56; 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 00-13, [2000] B.C.I.P.C.D. No. 16, Order No. 62-1995, [1995] B.C.I.P.C.D. No.35 .

Cases Considered: *Rizzo & Rizzo Shoes Ltd.*, [1998]1 S.C.R. 27; *Canada (Information and Privacy Commissioner) v. Canada (Solicitor General)*, [1988] 3 F.C. 551; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *Architectural Institute of B.C. v. Information and Privacy Commissioner for B.C.*, 2004 BSC 217.

1.0 INTRODUCTION

[1] Early in 2008, the Insurance Corporation of British Columbia ("ICBC") retained PricewaterhouseCoopers ("PwC") to conduct an investigation into ICBC's Material Damage Research and Training Facility ("MDRT"). Following the release of PwC's findings and recommendations in July 2008, the three applicants in this case, The Vancouver Sun, the Globe and Mail and a Member of the Legislative Assembly ("MLA"), made requests under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). They asked for copies of

records related to the termination of ICBC employees, their rank or position, remuneration the employees received, including severance payments, and any discipline imposed on them.

[2] Under s. 23 of FIPPA, ICBC notified the affected third party of the three requests.¹ It told the third party that, in accordance with s. 22(3)(d) of FIPPA, it proposed to disclose the responsive records in severed form, withholding information that it said would identify the third party, such as his name, position, job duties and the identity of his supervisor. It said that, in arriving at its decision, it had considered the relevant circumstances in s. 22(2)(a), (e) and (h).

[3] The third party objected to ICBC's proposed disclosure of any information at all, arguing that it would harm his reputation and financial interests. After considering the third party's objections, ICBC decided to sever more information and notified the third party and applicants of its decision under s. 24 of FIPPA.

[4] The third party requested a review of ICBC's decision by this Office ("OIPC"). Mediation did not resolve the matter and it proceeded to an inquiry under Part 5 of FIPPA. The OIPC invited representations from the applicants, ICBC and the third party. Two of the applicants and ICBC made submissions but the third party did not.²

2.0 ISSUES

[5] The issue before me is whether the public body is required by s. 22(1) of FIPPA to refuse access to the information in dispute. Under ss. 57(2) and 57(3)(a), the applicants have the burden of proof regarding third-party personal information.

3.0 DISCUSSION

[6] **3.1 Records in Dispute**—Six pages of records are in dispute, three of which ICBC described as a letter of termination.³ ICBC said the records arose out of an internal investigation it launched into the MDRT which found that vehicles repaired at the facility were incorrectly designated and then sold to the public and ICBC employees.⁴

[7] Pending the outcome of this inquiry, ICBC said it has not disclosed any information about the third party.⁵ It said that it proposes to disclose the six pages in severed form, withholding information that it considers would directly or indirectly identify the third party: his name, address, severance amount, position, length of service, the name of his supervisor and

¹ ICBC also notified other affected third parties of the requests. Records related to those other third parties are not in issue here.

² The Globe and Mail did not make an initial submission by the due date. It was told it could make a late submission but it did not do so until after the extended due date. The OIPC therefore did not accept its brief late submission and told the Globe and Mail that it would not be permitted to submit a reply without permission. The Globe and Mail nevertheless submitted a brief reply without first requesting permission to do so. Given its failure to comply with the OIPC's deadlines and instructions, I have not considered its reply here.

³ The other three pages consist of a second letter to the third party, a short extract from a table of information on the individuals whom ICBC investigated and a page long extract from a summary of information on the same individuals.

⁴ Paras. 11 & 18, ICBC's initial submission.

⁵ Para. 7, Heather affidavit.

some employment history information. For reasons of public scrutiny, ICBC proposes to disclose the results of its investigation into the third party's knowledge or involvement and a summary of the actions ICBC took, in a form that it considers would not identify the third party.⁶

[8] With respect to the other third parties it notified as a result of the requests, ICBC said that six of them accepted its decision to release information. ICBC disclosed to the applicants a set of severed records related to these six individuals. It withheld identifying information but disclosed summaries of the roles those individuals played and the action ICBC took. ICBC said it also told the applicants the following about these six individuals:

Of the six people who did not request a review by the Commissioner:

- Two (2) employees voluntarily left the company. They did not receive 2007 Short Term Incentive Pay or a scheduled salary increase for 2008.
- Three (3) employees were reprimanded but remain with the company. ICBC decided their actions lacked judgement and warranted a letter of reprimand, but not termination of their employment.
- One (1) employee was dismissed without cause. Based on the facts reveals [*sic*] by the investigation, ICBC concluded it was in the company's interests to terminate employment.

Like any other organization, ICBC is required to provide pay in lieu of notice when an employee is dismissed without cause. The total cost of severance packages for all employees dismissed without cause will be up to \$825,000. It should be noted that this amount will be distributed among more than just one employee. This amount would be reduced if they find new employment during the 18-month notice period.⁷

[9] ICBC said that of the affected third parties whom it notified, two requested a review of its decision to disclose severed records. Of these two, one is the third party in this case, while the other later consented to ICBC's proposed disclosure.⁸

[10] At my request, ICBC helpfully provided me with copies of the other third-party records it disclosed so that I could review the records in dispute in context. ICBC's proposed severing of the records related to the third party in this case is consistent with the way it severed the records regarding the other third parties.

[11] **3.2 Application of Section 22(1)**—The relevant provisions are these:

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.

⁶ Paras. 5 & 11-12, ICBC's initial submission.

⁷ Para. 8, ICBC's initial submission. There is no indication in the material before me that the applicants requested a review of ICBC's decision regarding these six individuals.

⁸ Para. 7, Heather affidavit.

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- (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, ...
 - (e) the third party will be exposed unfairly to financial or other harm, ...
 - (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant
- (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if ...
- (d) the personal information relates to employment, occupational or educational history, ...
- (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,

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

"contact information" means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual

[12] Numerous orders have considered the application of s. 22, for example, Order 01-53:⁹

[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". ...

[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. ...

[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]

⁹ [2001] B.C.I.P.C.D. No. 56.

[13] I take the same approach here.

[14] **3.3 Does Section 22(1) Apply?**—ICBC argued that the information it proposes to sever is the personal information of the third party and is not “contact information”. ICBC also argued that s. 22(4)(e) does not apply here.¹⁰ Rather, in its view, the information it proposes to withhold falls under s. 22(3)(d) because it relates to

... the internal investigation that ICBC launched into the sale and servicing of vehicles repaired or rebuilt at its Burnaby-based Material Damage and Research Training Facility. Vehicles repaired at the facility were incorrectly designated and then sold to the public and ICBC employees.¹¹

[15] ICBC said that the investigation focussed on the workplace behaviour or actions of ICBC employees, including the third party. In its view, the disputed records relate to disciplinary actions it took respecting the third party as a consequence of its investigation. As such, ICBC argued, the information it wants to withhold comes under s. 22(3)(d). The remaining information is “identity neutral”, ICBC said, and thus its disclosure would not be an unreasonable invasion of third-party privacy.¹² Consistent with s. 22(2)(a), it believes it has struck the appropriate balance between protecting the third party’s privacy and “maintaining the highest degree of public accountability and transparency”.¹³

[16] The MLA argued that he should receive full details of the severance paid to each of the terminated employees, together with their names and positions. He acknowledged that he had requested personal information but, in his view, s. 22(4)(e) applies here and “full release of the information is vital in order to restore public confidence and accountability in the way the issue was dealt with”.¹⁴ The MLA pointed to previous orders on s. 22(4)(e) which have found that “severance” is a form of remuneration. Government’s release of severance information is routine, he said,¹⁵ as is its release of reports where employees leave without severance.¹⁶

[17] In the alternative, the MLA argued that, if the information falls under one of the subsections of s. 22(3)(d), which he denies, the factors in s. 22(2)(a) and (b) favour disclosure, as follows:

- ICBC has disclosed the total figure of \$825,000 in severance payments; however, details of the payments are desirable for subjecting ICBC’s activities to scrutiny because, even though ICBC and the responsible minister have acted on some of the PwC recommendations, many questions remain unanswered

¹⁰ Paras. 15-17, ICBC’s initial submission.

¹¹ Para. 18, ICBC’s initial submission.

¹² By “identity neutral”, I take ICBC to say that it considers that the third party would not be identifiable from the records as it proposes to disclose them.

¹³ Paras. 18-19, ICBC’s initial submission.

¹⁴ Para. 2, MLA’s initial submission.

¹⁵ The MLA referred here to the former president and chief executive officer of the BC Olympic and Paralympic Games Secretariat.

¹⁶ The MLA referred here to the former Deputy Minister to the Premier in 2009 and the former Chief Executive Officer of ICBC in 2008; paras. 2-38, MLA’s initial submission.

- ICBC terminated “several employees” without cause in relation to the 2008 investigation and yet paid severance, which indicates no evidence of wrongdoing; it is thus imperative to scrutinize ICBC’s response to the issues
- the broader issue is the fraudulent sale of vehicles with improperly disclosed safety records and, to prevent a recurrence, it is important to know how ICBC dealt with the issue¹⁷

[18] The Vancouver Sun also argued generally that, under s. 22(4)(e), it should receive details of the severance amounts and other payments, as well as the names and titles of the employees whom ICBC terminated. It is public money, The Vancouver Sun said, and the public should know how it was spent, for these reasons:

- the investigation found that ICBC employees had falsified records for 94 damaged vehicles so they could be sold at auction
- the investigation blamed most of the problems on “a tangle of contradictory corporate policies, corrupt managers and little to no ethical accountability”
- in order to understand and assess the actions that have been taken in their name, the public should know the names and titles of those involved, the details of what was paid to each person, what role each person played, what “punitive action” was taken and details of the payments each got as a result of termination¹⁸

[19] ICBC countered that it is necessary to take into account the context in which the disputed information appears and argued that its approach is consistent with past orders on s. 22(4)(e), as well as caselaw. In its view, s. 22(4)(e) concerns more generic or objective information about a particular public body position, position function or salary associated with that position, whereas s. 22(3)(d) refers to information that is “about” the consequences or results of a workplace disciplinary investigation into individual employees. ICBC argued that this is “highly sensitive” information specific to individuals linked to a disciplinary workplace investigation or disciplinary consequences flowing from that investigation, release of which is “presumptively harmful”. ICBC acknowledged that the requested information would reveal the position and severance information of the third parties but said its linkage

... to the investigation and disciplinary actions taken by ICBC changes its character to being about specific employees’ employment history, and not merely being about a public body position, function or the remuneration associated with a position. ... It is sufficient for public interest and accountability purposes that ICBC revealed that two employees voluntarily left the company, three were reprimanded, one was dismissed without cause and the total cost of the severance packages was up to \$825,000 ...¹⁹

¹⁷ Paras. 40-43, MLA’s initial submission.

¹⁸ Paras. 3-11, The Vancouver Sun’s initial submission.

¹⁹ Pages 2-5, ICBC’s reply submission. ICBC drew my attention to several orders on s. 22(3)(d) in support of its position, as well as *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at para. 21, *Canada (Information and Privacy Commissioner) v. Canada (Solicitor General)*, [1988] 3 F.C. 551, *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-67.

Whose personal information is it?

[20] The applicants' arguments concerned the desirability of disclosing information about all of the third parties about whom they requested records. I am of course dealing here only with the information related to the individual who requested this review. In assessing the parties' arguments, I have, however, kept in mind the responsive records as a whole, as ICBC disclosed them to the applicants.

[21] The first step in the analysis is to decide if the six pages in dispute contain personal information. There does not appear to any disagreement among the parties on this point. The pages contain the third party's name, home address, position title, service with ICBC, his supervisor's name and title, information on the severance package ICBC offered to him, actions ICBC's took and comments about him flowing from the investigation. I agree with ICBC that none of this information is "contact information" as defined in FIPPA. I find that all of the information in the six pages is third-party personal information.

Does s. 22(4)(e) or s. 22(3)(d) apply?

[22] The next step is to decide if s. 22(4)(e) applies.²⁰ 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.²¹ Information about the duties or responsibilities associated with a particular position that a given public body employee holds normally also falls under s. 22(4)(e).²² 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 01-53,²³ 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

²⁰ The parties did not argue that any other parts of s. 22(4) apply and I see no basis for them applying here.

²¹ See for example Order F09-15, [2009] B.C.I.P.C.D. No. 20, paras. 15-16.

²² See for example Order 02-56, [2002] B.C.I.P.C.D. No. 58, upheld on judicial review (*Architectural Institute of B.C. v. Information and Privacy Commissioner for B.C.*, 2004 BSC 217).

²³ [2001] B.C.I.P.C.D. No. 56.

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.

[24] The disputed information in this case appears in records arising out of an investigation into concerns about activities in ICBC's Material Damage Research and Training facility. It reveals the findings of the investigation with regard to the third party and the disciplinary action ICBC took as a result, including the severance package it offered him. Orders of this office have consistently found that information relating to workplace investigations and resulting disciplinary actions falls under s. 22(3)(d), not s. 22(4)(e).²⁴ For the same reasons as set out in those orders, I find that the third-party personal information in this case falls under s. 22(3)(d).

Relevant circumstances

[25] I will deal first with the MLA's contention that s. 22(2)(b) applies, favouring disclosure of the information in dispute. I accept that safety concerns were an aspect of the investigation. However, the information in question here relates to human resources matters and not to any safety issues. I therefore do not agree with the MLA that disclosure of the information in dispute would promote safety or public health and I find that s. 22(2)(b) does not apply here.

[26] ICBC said it took ss. 22(2)(e) and (h) into account,²⁵ although it did not elaborate on this point. The third party's response of October 2008 to ICBC's notification under s. 23 expressed concern about disclosure of any of the records, arguing that disclosure could cause him harm in light of his situation at that time. I do not of course have the benefit of the third party's views from a more recent perspective, as he chose not to make any submissions to this inquiry.

[27] I have carefully reviewed the records as ICBC proposes to disclose them in severed form, both in isolation and in comparison to those ICBC disclosed related to the other third parties. I agree with ICBC that this information, which concerns findings flowing from the investigation and the actions ICBC took, is "identity neutral". The information proposed for disclosure is similar in character to the other information ICBC disclosed and nothing before me indicates that the third party would be identifiable from it. It follows that ss. 22(2)(e) and (h) have no application with regard to this information.

[28] I also agree with ICBC that disclosure of the information it proposes to withhold could result in unfair harm as set out in ss. 22(2)(e) and (h), with one exception: the third party's severance amount in the termination letter. ICBC's submission indicates that it included this item among information it would withhold because it could identify the third party. It did not however explain how one might identify the third party from his severance amount and this is not clear from the records themselves or other material before me.²⁶ ICBC also did not explain how disclosure of this information could lead to any unfair harm to the third party as contemplated by ss. 22(2)(e) and (h). Nor am I persuaded from the information itself that its

²⁴ See Order 01-07, [2001] B.C.I.P.C.D. No. 7, Order 00-13, [2000] B.C.I.P.C.D. No. 16, Order No. 62-1995, [1995] B.C.I.P.C.D. No.35.

²⁵ Para. 5, ICBC's initial submission.

²⁶ I note that it disclosed severance information regarding another third party whom it terminated.

disclosure could have this result. Therefore, I find that, with the exception of the severance amount in the termination letter, ss. 22(2)(e) and (h) are relevant circumstances, favouring the non-disclosure of the information ICBC proposes to withhold.

[29] I am also satisfied that ICBC properly took s. 22(2)(a) into account in deciding to disclose information, in non-identifying form, about its investigation findings and actions. I would extend the same reasoning to the third party's severance amount in the termination letter that ICBC proposed to withhold. In my view, the disclosure of this information would assist in subjecting ICBC to public scrutiny. I do not however consider that disclosure of the name, title and other identifying information about the third party would assist in subjecting ICBC to public scrutiny.

Conclusion on s. 22(1)

[30] I found above that s. 22(3)(d) applies to the information in dispute. I also found that, except for the third party's severance amount, ss. 22(2)(e) and (h) apply to the information that ICBC proposes to withhold, favouring its non-disclosure, but that ss. 22(2)(e) and (h) do not apply to the information ICBC proposes to disclose. I also found that s. 22(2)(a) applies to the third party's severance amount, favouring its disclosure and rebutting the presumption in s. 22(3)(d) regarding this item. I therefore find that s. 22(1) does not apply to the information ICBC proposes to disclose and, except for the third party's severance amount, that s. 22(1) does apply to the information ICBC proposes to withhold.

4.0 CONCLUSION

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

1. Subject to para. 2 below, I require ICBC to refuse the applicants access to the information it withheld under s. 22(1).
2. I require ICBC to give the applicants access to the third party's severance amount in the termination letter.
3. I require ICBC to give the applicants access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before July 22, 2010 and, concurrently, to copy me on its cover letters to the applicants.

June 10, 2010

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator