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

Order F10-36

WORKSAFEBC

Celia Francis, Senior Adjudicator

November 3, 2010

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Summary: Widow and union of a worker killed in a workplace incident requested records of WorkSafeBC's investigation into the incident. WorkSafeBC disclosed most of the information, except the identifying information of several individuals. Section 22 found not to apply to most of the withheld information and WorkSafeBC ordered to disclose it.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(b)(f)(g)(h) and 22(3)(b)(d)

Authorities Considered: B.C.: F10-37, [2010] B.C.I.P.C.D No. 55; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 01-19, [2001] B.C.I.P.C.D. No. 20; F05-32, [2005] B.C.I.P.C.D. No. 44

1.0 INTRODUCTION

[1] In November 2004, a worker died as the result of an incident in the lumber mill where he worked. In March 2007, the worker's union, acting on behalf of itself and the worker's widow,[1] requested access under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to records related to WorkSafeBC's investigation into this workplace fatality.[2] WorkSafeBC responded

[1] For ease of reading, I will refer to the applicants collectively as the union, as it acted for itself and the widow throughout this matter and made all the submissions.

[2] Some of the records in WorkSafeBC's file relate to the New Westminster Police Board's ("NWPB") investigation of the fatality. WorkSafeBC transferred to the NWPB the part of the request that relates to those records. The union's requests for the NWPB's investigation records are the subject of Order F10-37, [2010] B.C.I.P.C.D. No. 55, which I am issuing concurrently with this one.

by disclosing records in stages between April 2007 and February 2009, withholding some information under ss. 16(1)(b), 21 and 22 of FIPPA. The union requested a review of WorkSafeBC's decision to deny access.

[2] As a result of mediation of the review, WorkSafeBC disclosed more information. The union agreed not to pursue the information that WorkSafeBC had withheld under s. 16(1)(b) and s. 21, as well as records from the BC Coroners Service. The union also confirmed that it only wanted the names and occupations of individuals mentioned in the records, except for names of employees of an engineering firm. Mediation did not otherwise resolve the matter and so it proceeded to an inquiry under Part 5 of FIPPA.

[3] This Office ("OIPC") invited representations from the union, WorkSafeBC and a number of third parties mentioned in the responsive records. The union and WorkSafeBC provided submissions. Four third parties also provided submissions through one legal counsel. The Portfolio Officer's fact report that accompanied the notice for this inquiry states that one of the other third parties had died since the incident. WorkSafeBC confirmed the identity and date of death of this individual and said that his widow did not want his name or occupation disclosed.[3] The remaining third parties did not respond to the invitation to provide representations.

2.0 ISSUES

[4] The issue before me is whether WorkSafeBC is required by s. 22 of FIPPA to withhold information. Section 57 of FIPPA sets out the burden of proof in an inquiry. Under s. 57(2), the applicant has the burden of showing that disclosure of third-party personal information would not be an unreasonable invasion of third-party privacy.

3.0 DISCUSSION

[5] **3.1 Background**—The worker was fatally injured in an incident in his workplace. WorkSafeBC investigated this workplace fatality over the following 2½ years and, in March 2007, imposed a fine of $297,120.80 against the worker's employer in relation to his death.[4]

[6] **3.2 Records in Dispute**—The union provided this description of the records:

- an Incident Investigation Report prepared by WorkSafeBC dated March 5, 2007

[3] WorkSafeBC letter of June 30, 2010.
[4] Paras. 5-6, WorkSafeBC's initial submission; para. 6, Stewart affidavit.

- emails and work orders arising both before and after [the worker's] death dealing chiefly with safety and equipment issues
- company safety records[5]
- transcripts of 20 witness statements from interviews conducted by WorkSafeBC
- a report dated July 14, 2005 prepared by WorkSafeBC BC summarizing its investigation into [the worker's] fatality
- company investigation reports into [the worker's] fatality
- a presentation by the Company respecting [the worker's] fatality[6]

[7] WorkSafeBC said it disclosed almost all of the information in these records, including information about some of the third parties who were interviewed or otherwise involved in the incident and subsequent investigation, and who consented to the disclosure of their identifying information. WorkSafeBC said it withheld the names, occupations and other identifying information of third parties who had not consented to the release of their personal information.

[8] As the union pointed out, while several third parties consented to the disclosure of their names and occupations, WorkSafeBC was not consistent in disclosing this information. For example, it disclosed the identifying information of each consenting third party in his own witness statement but did not disclose the same information in the witness statements of other third parties. WorkSafeBC also severed some, though not all, third-party names and occupations, of both consenting and non-consenting third parties, in other types of records, such as reports, emails and work orders.[7]

[9] **3.3 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.
>
> (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 …
>
> (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,

[5] Included in this category are company reports dating back to the early 2000s setting out workplace performance issues respecting the deceased worker and his co-workers.
[6] Para. 8, union's initial submission.
[7] Paras. 10-12, union's initial submission.

> ...
>
> (f) the personal information has been supplied in confidence,
>
> (g) the personal information is likely to be inaccurate or unreliable, and
>
> (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 …
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation, …
>
> (d) the personal information relates to employment, occupational or educational history, …

[10] Numerous orders have considered the application of s. 22, for example, Order 01-53:[8]

> [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]

[11] I take the same approach here.

[12] **3.4 Does Section 22(1) Apply?—**WorkSafeBC argued that the information in question is third-party personal information. In its view, the information falls under ss. 22(3)(b) and (d) and the relevant circumstances favour

[8] [2001] B.C.I.P.C.D. No. 56.

its withholding.[9] The third parties who made submissions took the same position.[10]

[13] The union conceded that the information in dispute is personal information and that the personal information in issue falls under s. 22(3)(b). However, it took the view that the relevant circumstances favour disclosure of all of the withheld information in issue, rebutting the presumption in s. 22(3)(b).

[14] I agree with the parties that the disputed information is "personal information" as defined in Schedule 1 of FIPPA (recorded information about an identifiable individual), as it consists of third parties' names and occupations. Other withheld information consists of comments by or about third parties, including the deceased worker. There is also some withheld information about third parties' work history, such as places they had worked, in what capacity and for how long, and some home addresses and home telephone numbers.

[15] I emphasize however that only the third parties' names and occupations are in issue here.[11] This is the "disputed information" and thus the only personal information I consider here.

[16] **3.5 Unreasonable Invasion of Privacy**

Compiled as part of an investigation

[17] WorkSafeBC said that it has a regulatory mandate under the *Workers Compensation Act* ("WCA") to maintain reasonable standards for the protection of workers' health and safety. It also has the duty to enforce regulations for the protection of workers' health and safety in the workplace, contravention of which is an offence under the WCA. As an alternative to prosecution, the WCA authorizes WorkSafeBC to impose administrative penalties of up to $565,823.60 against employers for contravening occupational health and safety requirements or otherwise failing to maintain a safe workplace. WorkSafeBC said that it investigates workplace accidents to determine the facts of an incident and identify the underlying causes. In this case, as noted above, after its investigation, it imposed an administrative penalty of $297,120.80 on the employer.[12]

[18] WorkSafeBC said that the information in question was compiled and is identifiable as part of an investigation into a possible violation of the WCA. It said

[9] WorkSafeBC considers that s. 22(4) has no application here. This section lists types of information the disclosure of which is not an unreasonable invasion of third-party privacy. I agree with the WorkSafeBC that it does not apply here.

[10] Paras. 16-25, third parties' initial submission.

[11] Para. 19, portfolio officer's fact report which stated that the union had narrowed the scope of the information it wanted to these elements.

[12] Paras. 2-6, Stewart affidavit. WorkSafeBC specified a number of sections of the WCA which it give the authority to do these things.

it completed the investigation in March 2007 and imposed a penalty on the employer. No criminal charges were laid against the employer. In its view, therefore, disclosure is not necessary to prosecute a violation or to continue the investigation. Thus in its view the information in dispute falls under s. 22(3)(b).[13]

[19] As noted, the union accepts that WorkSafeBC compiled the disputed information under s. 22(3)(b).

[20] I am also of the view that WorkSafeBC compiled the information in dispute as part of an investigation into a possible violation of law and it is identifiable as such. I therefore find that s. 22(3)(b) applies to this information. I find support for this conclusion in Order 01-19,[14] where Commissioner Loukidelis made the same finding in a similar case.

Employment history

[21] WorkSafeBC argued that the information in dispute appears in the context of a workplace investigation. Its disclosure would, in WorkSafeBC's view, reveal information about the third parties' employment duties, including in relation to the incident in which the worker died, and thus their employment history.[15]

[22] The union disagreed with WorkSafeBC on this point, arguing the investigators collected the information in issue in the course of an accident investigation into a workplace fatality, not a workplace investigation into complaints of employee misconduct. This investigation focused on safety, the union argued, while previous orders have said workplace investigations focus on the employment relationship, interactions among employees, employee misconduct and employee discipline. The names and occupations of the third parties, as witnesses to or as involved in, the incident, are not in themselves employment history information, the union argued, referring to Order 01-19 for support. The third parties were not the subject of the investigation, the union submitted, and thus the information in dispute is not their employment history information under s. 22(3)(d).[16]

[23] The union's attempt to distinguish the investigation in this case from other workplace investigations is not persuasive. Contrary to the union's argument, Order 01-19 did not find that s. 22(3)(d) did not apply to witnesses' names and occupations. Rather, it is silent on this point. The names and occupations of the third parties in question here appear in the context of an investigation into a fatal accident that occurred in the workplace. Thus, I find that s. 22(3)(d) applies to this information.

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[13] Para. 23, WorkSafeBC's initial submission.
[14] [2001] B.C.I.P.C.D. No. 20
[15] Paras. 19 & 25, WorkSafeBC's initial submission. WorkSafeBC referred also to Order 01-53 in this regard.
[16] Paras. 1-18, union's reply submission.

[24] **3.6 Relevant Circumstances**

The parties raised a number of relevant circumstances. For reasons which follow, I have concluded that the relevant circumstances favouring disclosure rebut the presumed invasion of privacy in ss. 22(3)(b) and (d), with a few minor exceptions.

Promote health or safety

[25] WorkSafeBC said it disclosed as much information as possible, including most of the incident investigation report, witness observations of the incident and the general content of the records, including "the facts that outline the events of November 17, 2004, which resulted in the tragic death" of the worker. Disclosure of the names and occupations of the "non-consenting" third parties and a small amount of other withheld information would not, in WorkSafeBC's view, promote health and safety and thus s. 22(2)(b) does not apply here.[17] The third parties agree.[18]

[26] The union argued the contrary, noting that the NWPB concluded that there were reasonable grounds under which to lay charges of criminal negligence against the worker's employer. Given the circumstances of the worker's death and Crown counsel's refusal to lay charges, the union argued, the widow and the union have "serious concerns about the adequacy, utility and application" of the "Westray amendments" to the *Criminal Code* that were designed to enhance workplace health and safety by imposing liability on corporations for criminal negligence". In the union's view it is "important and necessary" to understand the roles individual employees and supervisors played in the events giving rise to the worker's death so as to understand how the law could be amended further or better applied to more effectively protect workers' health and safety. Disclosure of the third parties' names and occupations would provide "additional insight" into the worker's death, the union argued, which the current severing does not do.[19]

[27] I have carefully reviewed the responsive records, both those containing information in dispute and those which WorkSafeBC disclosed in full. In the case of WorkSafeBC's investigation report, the disclosed information includes the occupations but not the names of those involved. However, both names and occupation of some third parties are severed in most other records. I agree with WorkSafeBC that the information it has disclosed sets out the steps leading up to and following the fatal incident. In my view, however, given the severing of many third-party names, some of it inconsistent, the disclosed information does not adequately illuminate what happened and why. The roles of the individuals

[17] Paras. 27-29, WorkSafeBC's initial submission. WorkSafeBC referred to F05-32, [2005] B.C.I.P.C.D. No. 44, for support of its argument.
[18] Paras. 13-16, third parties' reply submission.
[19] Paras. 37-43, union's initial submission; paras. 19-23, union's reply submission.

involved, in particular the deceased worker's supervisors and managers, are not always clear in the transcripts and other records. Disclosure of the third-party names and occupations in issue would in my view enhance the readability and coherence of the records. It would also add meaning to the union's understanding of how the incident came about. Given the union's role, it would also promote health and safety. I therefore find that s. 22(2)(b) is a relevant circumstance favouring disclosure and I give it some weight.

Inaccurate or unreliable information

[28] Only the union raised this factor, arguing that it does not apply as it is unlikely that the names and occupations are inaccurate and unreliable.[20] I agree. There is no evidence that the third parties' names and occupations are inaccurate or unreliable. I find that s. 22(2)(g) is not relevant here.

Unfair damage to reputation

[29] WorkSafeBC said that some of the records concern the consideration of penalties under the *Workers Compensation Act* and criminal charges under the *Criminal Code* against the worker's employer, including information related to "the actions of specific individuals in relation to those considerations". Some third parties mentioned in the records were dismissed by the worker's employer as a result of their actions in relation to the incident, WorkSafeBC said.[21] Moreover, WorkSafeBC said, the sawmill where the incident took place is no longer operating and the employees have all moved on in the years since the incident. It is unlikely, WorkSafeBC argued, that these third parties' current managers, co-workers and friends are aware of their involvement in the incident. Disclosure of the information could, in WorkSafeBC's view, result in "ridicule, and loss of respect by co-workers and friends, and detriment to current or future employment", and thus disclosure would lead to unfair harm to the reputations of third parties under s. 22(2)(h).[22]

[30] The third parties said they support WorkSafeBC's position on this factor but did not elaborate.[23]

[31] The union disputed these arguments, saying that, although WorkSafeBC imposed a penalty on the employer, there was no evidence that any individual had been, or would be, either penalized under the WCA or charged under the *Criminal Code*. The union argued that the third parties' names and occupations appear in a "factual and non-evaluative context" and not in the "context of opinions or evaluative statements". Disclosure of the name of the supervisor who was said in a particular record to have a legal duty to prevent bodily harm to

[20] Para. 53, union's initial submission.
[21] WorkSafeBC did not say which third parties were dismissed.
[22] Paras. 30-32, WorkSafeBC's initial submission.
[23] Para. 4, third parties' reply submission.

those under his immediate supervision and who sent the worker to do a job would not, the union argued, unfairly damage that individual's reputation. Any damage would be fair in the union's view given the nature of the information. WorkSafeBC has not provided any evidence that third parties were dismissed because of their actions with respect to the worker's death, the union added. The union argued that WorkSafeBC's arguments on harm to the third parties in their current situations are speculative and that the third parties had provided no argument or evidence that disclosure of their names and occupations would expose them to unfair harm.[24]

[32] I do not entirely agree with the union that all of the information in dispute appears in a "factual and non-evaluative context". However, any damage to the third parties' reputations is likely to have occurred already, given the extent of the disclosures to date and the union's own awareness. The third parties did not provide me with any submissions on possible damage to their reputations and, without more, I am not persuaded that disclosure of their names and occupations could result in any damage to their reputations nor that, if it did, any such damage would be "unfair". I find that s. 22(2)(h) does not apply here.

Confidential supply

[33] In the union's view, there was no expectation of confidentiality in the creation of the witness statements, emails, work orders and other responsive records. It argued that witnesses gave their statements and other documents in the course of a high-profile investigation into the worker's death, which could have led to the laying of administrative charges or penalties under the WCA. The union also argued that there was no evidence in the statements or other records that witnesses were given assurances of confidentiality when they provided information to the investigators. In addition, the union argued, WorkSafeBC issued a media release on its investigation and the $297,000 penalty, in which it said that twelve individuals were aware of the risk associated with the activity which led to the worker's death. This action constitutes a waiver of any claim of confidentiality, in the union's view.[25]

[34] The third parties generally disputed the union's arguments on this factor but again provided no particulars.[26]

[35] I agree with the union that the records themselves, together with the evidence of its representative who was present for some interviews, indicate that WorkSafeBC did not give any assurances of confidentiality when its investigators interviewed the witnesses and collected other information. I also note that

[24] Paras. 24-34, union's reply submission.
[25] Paras. 44-52, union's initial submission; the union reiterated much of its arguments on this point in its reply submission.
[26] Paras. 19-20, third parties' reply submission.

WorkSafeBC did not address this issue at all and that the third parties provided no evidence on this point. I find that the factor in s. 22(2)(f) is not present here.

Applicant's knowledge

[36] WorkSafeBC acknowledged that an applicant's awareness of personal information is a relevant circumstance under s. 22(2). It argued however that the information in question appears in the context of a workplace investigation and would reveal how the third parties were involved in the incident. In this case, the applicant's awareness does not, in WorkSafeBC's view, favour disclosure.[27]

[37] The union relied heavily on Order 01-19, arguing that the widow's knowledge of the third parties' names and occupations meant that disclosure of this information would not be an unreasonable invasion of third-party privacy. The widow deposed that her husband frequently spoke to her about work and his co-workers and supervisors and that she had heard of or knew of many of these individuals. A union representative deposed that he knew many workers at the company and listed the names and occupations of those he believes may have had some association with the incident.[28]

[38] Although WorkSafeBC withheld the names of a number of third parties in its investigation report, it disclosed their occupations. WorkSafeBC also fully disclosed an organization chart for the employer (p. 337 of the disclosed records) which lists the names and occupations of many of its employees, including supervisors and managers. WorkSafeBC also disclosed a number of emails (pp. 168 to 173 of the disclosed records, for example) containing third-party names and other identifying information, although, as noted earlier, it appears to have been inconsistent in its severing of these and other records. In still other records, such as WorkSafeBC's memorandum on the investigation and witness statements, WorkSafeBC severed the names and occupations of some though not all third parties. WorkSafeBC did not explain these apparent discrepancies. The union's own knowledge of the workplace and employees,[29] including via WorkSafeBC's previous disclosures, favours disclosure of the withheld information in this case. I give this factor considerable weight.

"Legitimate interest"

[39] The union argued that Commissioner Loukidelis found that the applicant in Order 01-19, also the widow of a worker killed in a workplace accident, had "a legitimate interest" in disclosure of personal information related to her husband's death and that this was a relevant factor. The same applies here, the union argued, and in addition the third-party information appears in a "factual and

[27] Paras. 33-35, WorkSafeBC's initial submission.
[28] Paras. 28-32, union's initial submission.
[29] The affidavit of its union representative at para. 8.

non-evaluative context". The union also made arguments similar to those it made in the related case (see para.63 of Order F10-37).[30]

[40] The third parties disagree that the applicant has a "legitimate interest" in the information in dispute, saying WorkSafeBC disclosed the general contents of the records, including factual information about how the incident occurred and witnesses' observations. In their view, the union has not shown how disclosure of their names and occupations would benefit the widow or the union.[31]

[41] I accept that the union and the widow have an interest in knowing the circumstances of the worker's death. I also take into account that the third parties were the deceased worker's co-workers. I am also mindful that some of the third parties whose names and occupations are in dispute were the deceased worker's supervisors and managers and thus in positions of authority over him. Although WorkSafeBC has already disclosed most of the information in the records, the union and the widow have a "legitimate interest" in having a complete picture of WorkSafeBC's investigation and the roles of those involved. I consider that disclosure of the information in dispute would to add to their understanding of how the fatal incident arose. For these reasons, I find that this factor is relevant, weighing in favour disclosure.[32]

Conclusion on s. 22(1)

[42] I found above that ss. 22(3)(b) and (d) apply to the disputed information, the names and occupations of the third parties. I also found that the factors in ss. 22(2)(f), (g) and (h) are not present.

[43] However, I also found that the union's knowledge of the withheld information, including through the disclosures the WorkSafeBC has made to date, together with the factor in s. 22(2)(b) and the fact that the union and the widow have a "legitimate interest" in knowing the full story, are relevant circumstances weighing in favour of disclosure of the disputed third-party names and occupations. These are factors to which I give considerable weight. In these circumstances, I fail to see how disclosure of the disputed information would result in an unreasonable invasion of third-party privacy. I find that the relevant circumstances rebut the presumed unreasonable invasion of third-party privacy. The union has met its burden of proof and I find that s. 22(1) does not apply to the disputed information.

[44] There are a few exceptions to this finding. The union has shown no knowledge of and has not otherwise persuaded me that it is entitled to the names of the deceased worker's co-workers in reports dating from the early 2000s on work performance issues, that is, on pp. 3, 4, 12, 15, 16, 18-30. I find that

[30] Paras. 16-43, union's initial submission; widow's and union representative's affidavits.
[31] Paras. 10-12, third parties' reply submission.
[32] Again, Commissioner Loukidelis made a similar finding in Order 01-19.

s.22(1) applies to these co-workers' names. The names of supervisors and trainers on these pages should however be disclosed. While the union may not be interested in the information to which I find s. 22(1) applies, it has also not persuaded me that the relevant circumstances rebut the presumed unreasonable invasion of privacy of these individuals.

4.0 CONCLUSION

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

1. Subject to para. 2 below, I require the head of WorkSafeBC to provide the union with access to the names and occupations it withheld under s. 22(1).

2. I require the head of WorkSafeBC to refuse the applicant access, under s. 22(1), to the names of the deceased worker's co-workers on pp. 3, 4, 12, 15, 16, 18-30.

3. I require the head of WorkSafeBC to give the union access to the information described in para. 1 above within 30 days of the date of this order, as FIPPA defines "day", that is, on or before December 16, 2010, and concurrently to provide me with a copy of its covering letter to the union.

November 3, 2010

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

OIPC File No. F09-37735