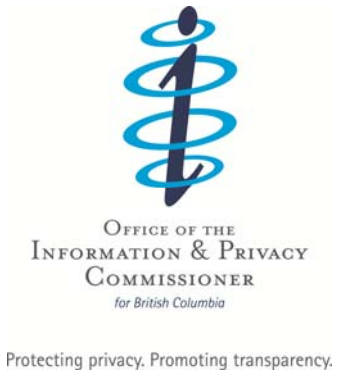

Decision F11-02

MINISTRY OF FINANCE

Michael McEvoy, Adjudicator

May 12, 2011

Quicklaw Cite: [2011] B.C.I.P.C.D. No. 17
CanLII Cite: 2011 BCIPC No. 17
Document URL: http://www.oipc.bc.ca/orders/section56/DecisionF11-02.pdf

Summary: The Ministry asked, under s. 56, that an inquiry not be held respecting the Ministry's decision to sever information from transcripts derived from certain interview notes. The Ministry argued the matter was moot because the applicant had already obtained an unsevered version of the records through a BC Human Rights Tribunal proceeding. In the alternative, the Ministry submitted it was plain and obvious that s. 22 of FIPPA applied to the records. The Ministry's request was denied. The matter was not moot because the disclosure of the unsevered records through the BC Human Rights Tribunal process was restricted to their use in that proceeding only. The applicant was requesting the records for use in another proceeding. Further, it was not plain and obvious that s. 22 applied to the information in dispute.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 56 and 22(1)

Authorities Considered: B.C.: Decision F07-04, [2007] B.C.I.P.C.D. No. 20; Decision F08-08, [2008] B.C.I.P.C.D. No. 26; Decision F08-11, [2008] B.C.I.P.C.D. No. 36; Order No. 160-1997, [1997] B.C.I.P.C.D. No. 18; Order No. 273-1998, [1998] B.C.I.P.C.D. No. 68; Order 01-53, [2001] B.C.I.P.C.D. No. 53; Order F11-02, [2011] B.C.I.P.C.D. No. 2.

1.0 INTRODUCTION

[1] The Ministry of Finance ("Ministry") has asked that, under s. 56 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), an inquiry on the respondent's request for review not be held respecting his request for records.

For reasons that follow, I have exercised my discretion not to grant the Ministry's request.

2.0 BACKGROUND

[2] The applicant worked for the Workers' Compensation Appeal Tribunal ("WCAT") as a legal researcher between 2005 and 2006. WCAT, in concert with the BC Public Service Agency ("PSA"), conducted several interviews with its employees in 2006 to determine whether the applicant should face disciplinary action in relation to interactions with a supervisor.[1] The result was a two-day suspension. In 2009, the applicant made an access request to WCAT for audio tapes of the interviews. WCAT transferred the request to the Ministry of Citizens' Services, as it was then responsible for the PSA, the Agency that assisted with the interviews and has custody and control of the records. The Ministry is now responsible for that Agency. Seven tapes were responsive to the applicant's request and the Ministry released complete transcripts for four of them. It disclosed the remaining three transcripts of the interviews of two employees, withholding information under s. 22 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The applicant complained that he wanted audiotapes, not transcripts. The Ministry responded that it was unable to sever excepted information under s. 22 from audiotapes. The applicant wrote to the Office of the Information and Privacy Commissioner ("OIPC") requesting a review of the Ministry's decision in October 2009.

[3] Parallel to these proceedings, the applicant filed a complaint against the Law Society of BC ("LSBC") with the BC Human Rights Tribunal ("BCHRT") alleging the LSBC discriminated against him because of a mental disability. The BCHRT found in the applicant's favour and agreed to consider the issue of remedy in a subsequent hearing. Related to the remedy hearing, the applicant requested that WCAT release, among other things, an unsevered transcript of an interview with one of the employees. The BCHRT ordered WCAT to provide an unsevered copy of the interview transcript of one of the employees. The Ministry later released the unsevered interview transcript of the other. Both disclosures were conditional on the transcripts not being used or disclosed for other purposes.

[4] In December 2010, the Ministry told the applicant it was closing the file relating to his access request, since he had already received the records he was seeking through the BCHRT process. In February 2011, the Ministry became aware the applicant wished to continue with his OIPC review application. The Ministry then contacted the OIPC requesting that the matter not proceed to an inquiry. The filing of final submissions on this request occurred April 13, 2011.

---

[1] The reference to the interaction with the supervisor is found in the applicant's submission at para. 1. I derived the rest of the background facts from the Ministry's submission, paras. 2.10 to 2.16.

3.0 ISSUE

[5] Section 56(1) of FIPPA reads as follows:

> **Inquiry by Commissioner**
>
> 56(1) If the matter is not referred to a mediator or is not settled under section 53, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[6] A number of previous decisions have laid out the principles for the exercise of discretion under s. 56.[2] In Decision F08-11, Senior Adjudicator Francis summarized the principles that govern the discretion in s. 56:

- the public body must show why an inquiry should not be held
- the respondent (the applicant for records) does not have a burden of showing why the inquiry should proceed; however, where it appears obvious from previous orders and decisions that the outcome of an inquiry will be to confirm that the public body properly applied FIPPA, the respondent must provide "some cogent basis for arguing the contrary"
- the reasons for exercising discretion under s. 56 in favour of not holding an inquiry are open-ended and include mootness, situations where it is plain and obvious that the records fall under a particular exception or outside the scope of FIPPA, and the principles of abuse of process, *res judicata* and issue estoppel
- it must in each case be clear that there is no arguable case that merits an inquiry[3]

[7] I apply these principles here.

4.0 DISCUSSION

Is record disclosure a moot point?

[8] The Ministry argues that the severance of information under s. 22 is a moot point because the applicant obtained unsevered copies of the transcripts through the BCHRT disclosure process. The Ministry argues that in two previous orders[4] Commissioner Flaherty found that public bodies were not required to provide records again in response to requests under FIPPA. The Ministry submits that the Commissioner reached this conclusion "even though the courts

---

[2] See, for example, Decision F07-04, [2007] B.C.I.P.C.D. No. 20; Decision F08-08, [2008] B.C.I.P.C.D. No. 26; and Decision F08-11, [2008] B.C.I.P.C.D. No. 36.
[3] Decision F08-11, para. 8.
[4] Order No. 160-1997, [1997] B.C.I.P.C.D. No. 18 and Order No. 273-1998, [1998] B.C.I.P.C.D. No. 68.

have held that documents disclosed in civil litigation are subject to an implied undertaking not to use the documents for any other purpose."[5] Therefore, the Ministry argues, an inquiry dealing with the merits of the severing under s. 22 would serve no useful purpose.

[9] The applicant argues the reasoning of the two orders noted above is not applicable here. The applicant submits there is no indication in either of those two decisions that the applicant sought production of the records for any other purpose than for which the records had already been disclosed.

[10] Having carefully considered the parties' submissions, I cannot accept the Ministry's submission that disclosure of the records is a moot point. Both WCAT's release of the unsevered transcripts under the BCHRT order and the Ministry's release were subject to the condition that, as the Ministry puts it, the documents "not be used or disclosed for other purposes."[6] The applicant says he seeks the records for another purpose, *i.e.* a "union grievance process." The previous disclosure of records does not assist the applicant in this regard because that disclosure was restricted. Neither Order No. 160-1997 nor No. 273-1998, the parties refer to, explicitly deals with a situation where an applicant seeks records that were previously disclosed under restricted conditions Therefore, I do not find these cases of assistance.

Is it plain and obvious s. 22 applies?

[11] Given the applicant's request for the information is not moot, I must now decide whether it is plain and obvious that s. 22 applies to the severed information. In doing so, I take an approach to s. 22 that numerous previous orders have delineated.[7] First, the public body must determine if the information in dispute is personal information. Then, it must consider whether disclosure of any of the information is not an unreasonable invasion of third-party privacy under s. 22(4).[8] Then the public body must determine whether disclosure of the information is presumed to be an unreasonable invasion of third-party privacy under s. 22(3). Finally, it must consider all relevant circumstances, including those listed in s. 22(2), in deciding whether disclosure of the information in dispute would be an unreasonable invasion of third-party privacy.

[12] The Ministry argues the disputed records concern third-party information that is clearly personal. It argues that several provisions under s. 22(3) of FIPPA apply and therefore a presumption exists that disclosing the information would be an unreasonable invasion of third-party privacy. It adds that all relevant circumstances under s. 22(2) of FIPPA lead to the same conclusion.

---

[5] Ministry initial submission, para. 4.06.
[6] Ministry initial submission, para. 2.12.
[7] For example, Order 01-53, [2001] B.C.I.P.C.D. No. 56.
[8] This section states that disclosure of a number of types of personal information is not an unreasonable invasion of third-party privacy.

[13] The applicant asserts that the severed records do not contain personal information. He refers to Order F11-02[9] in which the adjudicator determined that comments made by employees in their work capacity relating to their work were not opinions of a personal nature. The adjudicator concluded that the disclosure of that information would not unreasonably invade the commenters' privacy. Though he does not explicitly say so, I take the applicant to say that this reasoning applies to the withheld information in this case.

[14] With respect to relevant circumstances in this case, the applicant asserts that several circumstances under s. 22(2) weigh in favour of disclosure, including that he requires the records because they are relevant to a fair determination of his rights. He takes issue with the Ministry's submissions that the disputed information was supplied in confidence. He also argues that no presumptions under s. 22(3) apply here.

[15] I have carefully reviewed the parties' submissions and the records at issue, keeping in mind the approach to s. 22 and the test respecting the application of s. 56 set out above. Having done so, it is not plain and obvious to me that the Ministry is required to withhold the information at issue under s. 22. The applicant raises an arguable issue with respect to whether some of the information, given its context, if disclosed, would unreasonably invade a third party's privacy. The applicant also raises an arguable point with respect to whether disclosure of the information may be relevant to a fair determination of his rights. These are two examples of matters that an inquiry will fully examine. To be clear, I do not pass judgment on the merits of these arguments or the prospect of them succeeding at inquiry. The burden is on the Ministry to demonstrate there is no arguable case meriting an inquiry and it has failed to do so.

5.0 CONCLUSION

[16] I remit this matter to inquiry under Part 5 inquiry of FIPPA.

May 12, 2011

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

OIPC File: F09-40255

[9] [2011] B.C.I.P.C.D. No. 2.