



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

Order F10-44

CITY OF RICHMOND

Jay Fedorak, Adjudicator

December 22, 2010

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Summary: An applicant requested details of a settlement that a former employee received from the City. The City withheld the settlement agreement in its entirety under s. 22, on the grounds that disclosure would be an unreasonable invasion of the former employee's personal privacy. The applicant subsequently narrowed the request to the amount of money the City paid the former employee, as provided in the settlement agreement. Section 22 does not apply to the information withheld, because disclosure is desirable for public scrutiny. The City is ordered to disclose the financial amount paid to the former employee.

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

Authorities Considered: B.C.: Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order F10-21, [2010] B.C.I.P.C.D. No. 32; Order F10-05, [2010] B.C.I.P.C.D. No. 8; Order F09-15, [2009] B.C.I.P.C.D. No. 20; Order No. 74-1995, [1995] B.C.I.P.C.D. No. 47; Order No. 6-1994, [1994] B.C.I.P.C.D. No. 6; Order No. 24-1994, [1994] B.C.I.P.C.D. No. 27; Order 00-47, [2000] B.C.I.P.C.D. No. 51; Order No. 315-1999, [1999] B.C.I.P.C.D. No. 28; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order 03-15, [2003] B.C.I.P.C.D. No. 15.

1.0 INTRODUCTION

[1] This order arises from a request from an applicant for details of a settlement that a former employee ("third party") received from the City of Richmond ("City"), including the sum the City paid to the third party. The City responded by withholding a copy of the settlement agreement ("agreement") in

its entirety. The applicant requested a review of this decision from the Office of the Information and Privacy Commissioner (“OIPC”).

[2] Mediation failed to resolve the matter and an inquiry was held under Part 5 of FIPPA. The OIPC provided notice of this inquiry to the applicant, the third party and the City. Prior to the inquiry, the applicant agreed to narrow the scope of the request to encompass only the amount the City paid to the third party.

2.0 ISSUE

[3] The issue in this inquiry is whether the City is required to refuse access to the requested information under s. 22(1) of FIPPA. Under s. 57(2) of FIPPA, the applicant has the burden of proving that release of the requested information would not be an unreasonable invasion of the third party’s personal privacy.

3.0 DISCUSSION

[4] **3.1 Background**—The third party is a former employee of the City who commenced litigation against five other employees of the City (“defendants”) over various allegations that he made against them. The British Columbia Court of Appeal determined that the Supreme Court did not have jurisdiction over the matter. The third party also filed a complaint with the British Columbia Human Rights Tribunal, which denied the complaint on the grounds that he had failed to make it within the required period of six months after the alleged contravention. The City and its union subsequently agreed to retain an arbitrator to deal with the third party’s allegations. The arbitrator issued a decision that included a finding that the third party’s allegations were unsubstantiated. These issues received considerable local media coverage. The City and the third party subsequently resolved the matter through a negotiated agreement, one of the terms of which was that the details of the agreement were to remain confidential.¹

[5] **3.2 Record in Dispute**—The information in dispute is the financial amount that the City paid the third party as recorded in the settlement agreement.

[6] **3.3 Preliminary Issue**—The applicant attempted to provide new material *in camera* with their reply submission. I have determined that the information is not relevant to the issue in this case, which is whether s. 22(1) of FIPPA applies to the financial amount of the settlement. I have therefore decided not to consider whether the information is appropriate for a reply submission or whether it was provided appropriately *in camera*.

¹ The City’s initial submission, paras. 10-19.

[7] **3.4 Harm to Personal Privacy**—The relevant provisions of s. 22 in this case are 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,
 - (e) the third party will be exposed unfairly to financial or other harm,
 - (f) the personal information has been supplied in confidence,
 - (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
 - (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,...
- (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, ...

[8] Numerous orders have considered the application of s. 22, for example, Order 01-53:²

[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

² [2001] B.C.I.P.C.D. No. 56.

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] I have applied those principles here without repeating them.

Whose personal information is it?

[10] The City submits that the information at issue constitutes a financial payment to the third party and consequently is his personal information.³ The applicant does not contest this point. I agree with the City, as it is information about an identifiable individual. Therefore, I find that the information at issue constitutes "personal information".

[11] The City submits that disclosure of the information would also reveal information about the defendants.⁴ The applicant disagrees, stating that the amount of the legal settlement has nothing to do with the defendants.⁵

[12] I find that the information at issue does not reveal information about the defendants. The fact that the third party initiated litigation naming the defendants does not mean that disclosure of a financial payment to the third party discloses any information about the other employees. In fact, without revealing the reason for the payment, which the City has submitted *in camera*, I can say that nothing on the face of the record reflects on the defendants. Therefore, the information at issue is not the personal information of the defendants.

[13] Having determined that the information at issue is the personal information of the third party, I now move to the application of s. 22 to that personal information.

³ The City's initial submission, para. 29.

⁴ The City's initial submission, paras. 45-53.

⁵ Applicant's reply submission, p. 1.

Is information in the records about the position, functions or remuneration of the third party as a public body employee?

[14] The City submits that the payment to the third party does not constitute the remuneration of the third party as a City employee.⁶ It submits further that the payment was not severance; it did not pertain to a wrongful dismissal action; and it was not for “any alleged failure of the City to compensate the third party for the performance of his job duties”.⁷ The applicant did not address the issue of whether the information constituted remuneration paid to the third party.

[15] I agree with the City that the information is not about the remuneration of an employee of a public body. The payment was not to compensate him for work on behalf of the City: it did not constitute salary, benefits, severance, retirement allowance or another type of remuneration. Therefore, I find that s. 22(4)(e) of FIPPA does not apply. No other factors in s. 22(4) apply here either.

[16] As s. 22(4) of FIPPA does not apply in this case, I will now determine whether disclosure of the information in dispute is presumed to be an unreasonable invasion of privacy under s. 22(3).

Does information in the records relate to the third party’s employment history?

[17] The City submits that the information relates to the employment history of the third party because the information relates to the resolution of the litigation that the third party commenced as an employee of the City and for other reasons that it has provided *in camera*.⁸ I agree. The settlement agreement arose out of a workplace dispute, which is part of the third party’s employment history. Terms of the agreement, which I cannot divulge, clearly “relate” to the third party’s employment with the City. Consequently, the financial amount of the settlement “relates” to the third party’s employment history. Therefore, I find that s. 22(3)(d) of FIPPA applies to the information and disclosure is presumed to be an unreasonable invasion of privacy.

Does information in the records describe the third party’s finances?

[18] The City submits that the information constitutes a payment by the City to the third party and consequently is the financial information of the third party.⁹ I agree, for the reasons the City argued. Therefore, I find that s. 22(3)(f) of

⁶ The City’s initial submission, para. 43.

⁷ The City’s initial submission, paras. 37, 40.

⁸ The City’s initial submission, paras. 36 and 48.

⁹ The City’s initial submission, para. 43.

FIPPA applies to the information and disclosure is presumed to be an unreasonable invasion of privacy.

Does information in the records constitute a personal recommendation or evaluation or character reference?

[19] The City submits that s. 22(3)(g) applies because:

Settlements between employers and employees can be construed by members of the public negatively as an indication of the job performance of the employee, particularly where the employment relationship ends.¹⁰

[20] This is an incorrect application of s. 22(3)(g). For this provision to apply, the information must constitute an explicit evaluation of the third party by another party. The information at issue is a financial amount. The fact that disclosure might provoke various uninformed speculations among the public does not represent a particular evaluation of the third party. Therefore, I find that s. 22(3)(g) of FIPPA does not apply.

[21] Having found on two grounds that disclosure is presumed to be an unreasonable invasion of the personal privacy of the third party, I will now turn to whether the relevant circumstances rebut the presumption of unreasonable invasion of third-party privacy.

Is disclosure desirable for the purpose of subjecting the public body to public scrutiny?

[22] The applicant argues that the information should be disclosed to promote public accountability. The applicant submits:

The City of Richmond has a fiduciary responsibility to the taxpayers, and should be transparent with its expenditure of taxpayers' money. The taxpayers have a right to know how their elected officials spend their money.¹¹

[23] The applicant cites the following Orders in support of this position: Order F10-21;¹² Order F10-05;¹³ Order F09-15;¹⁴ Order No. 74-1995;¹⁵ Order No. 6-1994;¹⁶ and Order No. 24-1994.¹⁷

¹⁰ The City's initial submission, para. 56.

¹¹ Applicant's initial submission, p. 3.

¹² [2010] B.C.I.P.C.D. No. 32.

¹³ [2010] B.C.I.P.C.D. No. 8.

¹⁴ [2009] B.C.I.P.C.D. No. 20.

¹⁵ [1995] B.C.I.P.C.D. No. 47.

¹⁶ [1994] B.C.I.P.C.D. No. 6.

¹⁷ [1994] B.C.I.P.C.D. No. 27.

[24] The City agrees that one of the purposes of FIPPA is to make public bodies accountable. However, it says, another purpose of FIPPA is to protect privacy and employees of public bodies should not lose their privacy rights because their employers are subject to FIPPA, except as set out in s. 22(4)(e).¹⁸

[25] While I agree with the City that public body employees should not lose all of their privacy rights, there are circumstances in which disclosure of certain personal information of particular employees is desirable in order to promote public scrutiny of the public body.¹⁹ I agree with the applicant that disclosure is desirable in the circumstance of this case for the purpose of subjecting the City to public scrutiny. The information at issue is the amount that the City paid to an individual. There is a general principle that public bodies should be accountable to the public for the expenditure of public funds, including payments to individuals. This consideration weighs heavily in favour of disclosure.

Was the information supplied in confidence?

[26] The City submits that the confidentiality clauses within the agreement confirm that the information was “supplied in confidence” in accordance with s. 22(2)(f).²⁰ I disagree. The financial amount in the agreement was the result of negotiations between the City and the third party. The City has provided no indication as to whether a party “supplied” the information. Therefore, I find that s. 22(2)(f) does not apply to the information. Nevertheless, I consider it relevant that the parties to the agreement agreed to treat the terms of the agreement in confidence and not to disclose them. This does not mean that parties can devise contract language that would dictate whether the information would be withheld under FIPPA. Commissioner Loukidelis held in Order 00-47 that parties cannot “contract out” rights or responsibilities under FIPPA.²¹ It merely means that the parties may agree to treat the information in confidence and only disclose where required by law. This consideration, while not determinative of the issue, weighs against disclosure.

Would disclosure expose the third party unfairly to financial or other harm or unfairly damage the reputation of the third party?

[27] The City submits that disclosure of the information would damage the reputations of the third party and the defendants:

Given the previous media coverage on this issue, there is also a real risk that if any information from the Requested Information or Records is disclosed, it will lead to further media coverage of the Allegations. If this

¹⁸ The City's initial submission, para. 41 and reply submission, paras. 2-3.

¹⁹ For example, see Order F10-21, [2010] B.C.I.P.C.D. No. 32.

²⁰ The City's initial submission, para. 60.

²¹ Order 00-47 [2000] B.C.I.P.C.D. No. 51, paras. 10-45.

were to occur, the City submits that this would unfairly damage the reputation of the Third Party and the [defendants] given the sensitive nature of the Litigation, Allegations and Arbitration Decision.²²

[28] The City points out that the third party and the defendants have already been identified in the media and that it would be easy to connect the information in dispute with them, which, in its opinion, would damage their reputations.²³ The City argues that release of the information at issue would lead to the identification of the third party and the defendants and disclose details of their employment histories.²⁴

[29] I disagree with the City on these points. As I noted above, the information at issue is solely the amount of a financial payment to the third party. It does not constitute the employment history of the defendants. The applicant and the media are already aware of the fact that there was a payment. They just do not know how much it was. The City has failed to demonstrate how the disclosure of the actual amount (assuming any harm resulted from the media coverage about the existence of the payment) would cause further harm to the reputations of the individuals involved or cause them any other type of harm.

[30] The City also argues that any further media attention on this issue would cause other types of harm to the defendants, for reasons that it has submitted *in camera*. I disagree with this point as well, because it presumes that there would be further media attention only if I order the disputed information disclosed. The issue might or might not receive further media coverage no matter what I decide. In any case, I am not persuaded that disclosure of the disputed information would have the effect the City argues. Therefore, I find that ss. 22(2)(e) and (h) do not apply.

Would disclosure constitute an unreasonable invasion of the third party's personal privacy?

[31] I have found that disclosure is presumed to be an unreasonable invasion of the third party's personal privacy because it relates to his employment history and describes his finances. I have found further that the confidentiality provision in the settlement agreement weighs against disclosure, while the desirability of holding the City accountable weighs in favour of disclosure. I have also found that ss. 22(2)(e) and (h) do not apply, as it is reasonable not to expect that disclosure would harm anyone's reputation or otherwise cause them harm.

[32] In assessing the relative weight of these considerations, I consider three factors to be significant. The first is the nature of the information at issue. In this case, it is solely a financial amount. The applicant has provided copies of news

²²The City's initial submission, para. 70.

²³The City's initial submission, para. 62.

²⁴The City's initial submission, para. 74.

reports indicating that the third party received a financial settlement from the City and that the settlement agreement includes a confidentiality provision.²⁵ The purpose of the payment and the conditions placed upon it remain confidential and are not at issue. The information at issue does not directly or indirectly reveal anything about the third party, the City or the defendants other than the amount the third party received. There is nothing about the amount that reflects on anyone. I see no evidence that the disclosure of the mere amount could lead anyone accurately to infer anything about any of the parties.

[33] The second consideration is that the third party has not raised any concerns about the disclosure of information. All he said in his three-line submission was that the terms of the agreement prohibited him from disclosing any information, and he requested that his name not appear in any documents or in the newspaper. He submitted that “It is the responsibility of the City of Richmond if any disclosures are to be made.” He did not identify any concerns about how the disclosure of the information at issue might affect him.²⁶ He did not submit a reply submission.

[34] The third consideration is that a fundamental element of accountability of public bodies comes about through transparency concerning how they spend public funds. For the public to hold public bodies to account, the public should generally have access to information about who receives money from public bodies and how much.

[35] I note that the other undisclosed terms of the settlement agreement, which are not at issue here, include more detailed personal information about the third party. The reasons why the City does not want the information at issue disclosed apply more appropriately to this other more detailed information. In my view, those reasons do not bear relation to the single fact of how much money the City paid to the third party.

[36] For the reasons given above, in the circumstances of this case, I give more weight to the factor that disclosure is desirable for the purposes of subjecting payment by the City to public scrutiny and less weight to the factor that the parties agreed to treat the information in confidence. This is consistent with previous orders that have established the parties cannot “contract out” rights or responsibilities under FIPPA and in certain cases public bodies must disclose information despite confidentiality provisions in contracts.²⁷ Consequently, I find that the public scrutiny consideration rebuts the presumption of unreasonable invasion of privacy raised by the factors that the information is the financial information of the third party and relates to the third party’s employment history.

²⁵ Applicant’s initial submission, Appendix A.

²⁶ Third party’s initial submission, p. 1.

²⁷ See for example Order No. 315-1999, [1999] B.C.I.P.C.D. No. 28, Order 01-20, [2001] B.C.I.P.C.D. No. 21 and Order 03-15, [2003] B.C.I.P.C.D. No. 15.

[37] I find the applicant has met the burden of demonstrating that disclosure of the financial amount would not be an unreasonable invasion of the personal privacy of the third party. Therefore, I find that the City must disclose the information.

4.0 CONCLUSION

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

1. I require the City to disclose the information to the applicant.
2. I require the City 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 February 7, 2011 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

December 22, 2010

ORIGINAL SIGNED BY

Jay Fedorak
Adjudicator

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