OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

Order No. 330-1999

INQUIRY REGARDING E-MAIL MESSAGES IN THE CUSTODY OF THE MINISTRY OF FINANCE AND CORPORATE RELATIONS

David Loukidelis, Information & Privacy Commissioner
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Summary: Ministry refused to disclose e-mails sent by a third party to others, saying their disclosure would unreasonably invade third parties' privacy. E-mails contained statements about the applicant and considerable amounts of fact. E-mails also contained names and innocuous contact particulars of third parties. Ministry found not to be required by s. 22(1) of the Act to refuse to disclose the disputed records. Records contain no personal views or opinions of e-mails' author (including about the applicant). Rest of personal information in records found to be minimal. No unreasonable invasion of anyone's personal privacy from disclosure of personal information in the e-mails. Applicant entitled to have access to all of the e-mails.

Key Words: Personal information – unreasonable invasion of personal privacy – opinions about others – supplied in confidence – public scrutiny – unfair exposure to harm – unfair damage to reputation – employment history.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1); 22(2)(a), (e), (f), (h); 22(3)(b), (d); 22(4); 22(5).

Authorities Considered: B.C.: Order No. 52-1995, Order No. 81-1996, Order No. 302-1999.

1.0 INTRODUCTION

This inquiry stems from a 1998 land use proposal. The applicant was involved in a land use approval decision in which the author of almost all of the e-mails in dispute here was also involved (in a capacity other than his employment with the Ministry of Finance and

Corporate Relations ("Ministry")). The author had sent a number of e-mails, using the e-mail system of the Ministry, to other third parties. Those e-mails exist, for the purposes of this inquiry, in printed paper form.

In three cases, the printouts of the author's outgoing e-mails contain, at the bottom of the printout, e-mails sent by other third parties to the author. In two of those cases, the e-mails contain no discernable message. They appear to have had a document file attached to them electronically, but no attached document is set out in the e-mail printouts. Those two e-mails were addressed to the author and to other third parties, whose e-mail addresses appear in the e-mails headers. A third e-mail from a third party simply asks the author what word processor he uses. Even though three of the disputed e-mails contain messages that originated with third parties, I refer in this order to the author of the other e-mails as the "author". The Ministry referred to this individual in its submissions as the "Third Party". (It should be noted, at this point, that in my view nothing turns on the fact that three of the e-mails were not written by the author. For the reasons given below, I find that disclosure of any personal information in those other messages would not unreasonably invade the personal privacy of the author, the applicant or anyone else.)

The e-mails were deleted by the author, but were later restored by the Ministry for other purposes. Because the applicant was aware of these e-mails – having received a paper copy of one of them from some other source – the applicant made an access to information request to the Ministry for those e-mails on March 15, 1999.

On April 6, 1999, the Ministry wrote the applicant and said that it refused to give access to the 19 pages of responsive e-mail printouts. The records were withheld in their entirety. The Ministry's reasons for its decision, as set out in its April 6, 1999 response letter to the applicant, were as follows:

> The records you requested contain information that is excepted from disclosure under section 22 of the Act to prevent invasion of a third party's personal privacy.

Nothing more was said in that letter about how the information qualified as personal information of a third party or why it was being withheld to prevent invasion of the third party's personal privacy.

By a letter dated April 22, 1999, the applicant asked for a review, under s. 52 of the *Freedom of Information and Protection of Privacy Act* ("Act"), of the Ministry's decision to deny access. This order results from the inquiry held, under s. 56 of the Act, regarding that request for review.

The Ministry and the applicant both made submissions. The Ministry was represented by a lawyer, as was the applicant. The Ministry submitted an affidavit sworn July 14, 1999 by Linda Brandie. The author also made a submission.

2.0 ISSUE

The only issue to be decided in this inquiry is whether s. 22(1) of the Act requires the Ministry to refuse to disclose the disputed records to the applicant.

3.0 DISCUSSION

3.1 Burden of Proof – It is necessary to deal with the burden of proof before addressing the main issue. Because this inquiry in part involves a decision to refuse to give access to third party personal information, s. 57(2) of the Act places the burden on the applicant to "prove that disclosure of the personal information would not be an unreasonable invasion" of third party personal privacy.

This burden of proof was noted in the notice of inquiry sent by our office to the parties. It is clear from the Ministry's submissions that it considered the burden of proof issue. The Ministry said, at p. 6 of its initial submission, that the applicant has the burden of proof under s. 57(2) of the Act. The burden under s. 57(2) applies, however, only where the issue is about unreasonable invasion of the personal privacy of someone other than an applicant. In my view, the Ministry has the burden of proving, under s. 57(1) of the Act, that the applicant has no right of access to the parts of the disputed records that contain her own personal information. This is because s. 57(2) only places the burden of proof on the applicant in relation to "personal information about a third party". The reasons for this finding follow.

The Ministry acknowledged, at p. 6 of its initial submission, that "much of the information" in the records "is the personal information of the Applicant." Still, at para. 6.03 of its initial submission, the Ministry made the following point:

> As the records contain information about the Third Party [the author] and about other third parties, the burden of proof is, in accordance with section 57(2), on the applicant… .

The Ministry referred to Order No. 302-1999 on this issue. In that order, my predecessor dealt with a union's request for access to complaint letters about teachers. One teacher, who was the subject of some of the letters, was "represented by the union" in the inquiry. The following passage, from p. 3 of Order No. 302-1999, merits quotation here:

> The applicant has argued that the burden of proof should be on the public body, as the applicant has modified its original request to restrict it to those records which contain personal information about the applicant. Schedule 1, in the definition of "personal information," says that personal information includes "the individual's personal views or opinions, except if they are about someone else." Therefore, the applicant reasons that although the names of the complainants are properly third party information, the contents of the letters themselves are the personal information of the applicant.
>
> Under section 57(2), if the record or part that the applicant is refused access to under section 22 contains personal information about a third party, it is up to the

> applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy. Although I appreciate the logic of the applicant's argument, the fact remains that a portion of the records contains third party information and so must be subject to the burden of proof prescribed by the Act.

There is no doubt in my mind that this is correct as regards the burden of proof where access is sought by someone to personal information of a third party. Section 57(2) is clear about that. By contrast, however, where an applicant seeks his or her own personal information, the general burden of proof under s. 57(1) applies and the public body must prove that access may or must be denied (including under s. 22(1)). In my view, s. 57(1) is the starting point for the burden of proof in inquiries and s. 57(2) is an exception to the general rule in s. 57(1). This interpretation is supported by the language of s. 57(2). That section begins with the word "however", thus underscoring the nature of s. 57(2) as an exception to s. 57(1). Accordingly, the burden of proof will vary – as it does in this case – depending on the nature of the information found in a record. Here, the Ministry has the burden respecting any personal information of the applicant, while the applicant has the burden regarding personal information about the author and others.

I find in the alternative – for the reasons given below – that the applicant has met the burden of proof here under s. 57(2). Disclosure of the disputed information in the e-mails would not, in my view, unreasonably invade the personal privacy of the author or anyone else.

3.2 Relevant Legislative Provisions – Section 22(1) of the Act reads as follows:

> 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.

The term "personal information" is defined as follows in Schedule 1 to the Act:

> **"personal information"** means recorded information about an identifiable individual, including
> (a) the individual's name, address or telephone number,
> (b) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,
> (c) the individual's age, sex, sexual orientation, marital status or family status,
> (d) an identifying number, symbol or other particular assigned to the individual,
> (e) the individual's fingerprints, blood type or inheritable characteristics,
> (f) information about the individual's health care history, including a physical or mental disability,
> (g) information about the individual's educational, financial, criminal or employment history,
> (h) anyone else's opinions about the individual, and
> (i) the individual's personal views or opinions, except if they are about someone else … .

Taken together, the definition of personal information and s. 22(1) of the Act create an exception to the right of access to a record given by the Act. Section 22 applies only if an access request relates to "personal information" within the meaning of the Act's definition. If personal information is not involved, s. 22 is irrelevant.

The rest of s. 22 functions as a roadmap for a public body to guide its decision on whether s. 22(1) requires the public body to withhold personal information in a specific case. Section 22(3) sets out a number of (rebuttable) presumed unreasonable invasions of personal privacy. Section 22(2) requires the head of a public body to consider "all the relevant circumstances" in deciding whether disclosure of the personal information is prohibited. The relevant circumstances include those set out in s. 22(2). It is worth noting that s. 22(2) imposes this requirement where a public body is deciding whether an unreasonable invasion of personal privacy would occur under either s. 22(1) *or* (3).

3.3 Nature of the Disputed Information – Again, the Ministry conceded, at p. 6 of its initial submission, that "much of the information" in the records "is the personal information of the Applicant", but noted that "the names, email addresses, and similar information of the Third Party [author] and other third parties also appear in the records." It should be noted that the Ministry, in responding to the applicant, alluded only to the personal information of one third party. The Ministry now takes the position, it seems, that personal information of a number of third parties is involved here.

Review of the records confirms they contain personal information of a number of third parties. The personal information is, in my view, innocuous. The Act's definition of "personal information" says it includes, among other things, the "individual's name, address or telephone number". The records contain the names of two individuals who are either associates, principals or employees of a real estate developer. A telephone number is associated with the name of one of those individuals (although it seems likely it is a business number, this is not clear beyond doubt). The records also contain the names of several other individuals.

In a number of places, the records contain what some might describe as 'opinions' or 'views' attributable to identifiable individuals. The Act's definition of personal information includes an "individual's personal views or opinions, except if they are about someone else". This type of information in the records is discussed below.

Another type of personal information one might argue is found in the e-mails is opinions expressed by a third party about another individual. The definition of personal information found in the Act says opinions expressed by someone about another individual are personal information of the individual about whom the opinions have been expressed.

It is necessary to note here that I have concluded, based on the material before me, that the author was acting in a private capacity when he wrote these e-mails. It cannot credibly be suggested that the e-mails are Ministry records. If they had been Ministry records, because the author was acting in an official capacity, any views or opinions

expressed in the e-mails would not be the personal views or opinions of the author. This inquiry would not, in that case, be concerned with s. 22 as regards those views or opinions.

3.4 Is Personal Information In Issue Here? – The Ministry's submissions on s. 22(1) did not directly address the issue of whether disclosure of the names and telephone numbers of various third parties individuals was prohibited by s. 22. Instead, the Ministry focused its efforts on the applicant's personal information and the author's personal information. Because the records contain information that technically qualifies as personal information of the applicant and the author, as well as other individuals, it is necessary to divide the analysis below into several parts.

The first part of the analysis explains why I have concluded the e-mails do not contain personal information in the form of views or opinions of the author. As the discussion below indicates, this means that no personal privacy invasion issue arises in relation to the applicant or the author in connection with personal views or opinions.

The second portion of the analysis deals with other kinds of personal information of the applicant. The third section of the discussion deals with other types of the author's personal information. The final piece of the analysis deals with personal information of other individuals.

3.5 No Personal Views or Opinions Are Involved Here – Again, the Act's definition of "personal information" includes an "individual's personal views or opinions, except if they are about someone else". A number of the e-mails contain media advisories, media fact sheets and letters to politicians that apparently were drafted by the author for use by someone else in a public land use dispute. (The parties have proceeded in this inquiry, at least, on the basis that the content of the e-mails was prepared by the author.)

In one sense, the e-mails contain what might be described as views or opinions about the land use matter that occasioned their creation. But they do not qualify, in my view, as the "personal views or opinions" of the author as intended by the Legislature in the Act's definition of "personal information". Authorship of a view or opinion does not, on its own, mean that the view or opinion is the "personal" view or opinion of the author (especially where it is created for use by a third party for its own commercial purposes). The privacy protection principles underlying this aspect of the Act were not intended to protect media communications strategies or other media communications work.

In this light, my review of the disputed records, and the context in which they were created, leads me to conclude they do not contain the author's "personal" views or opinions, including about the applicant. The e-mails do not contain personal information of the author (in the form of his personal views or opinions). Nor do they contain personal information of the applicant (in the form of the author's opinions about the applicant). Accordingly, no s. 22(1) considerations arise in relation to the supposed opinions or views and the Ministry is not required to refuse to disclose the records on the

basis they contain these kinds of personal information. I find, therefore, that the Ministry was not required by s. 22(1) of the Act to refuse to disclose information to the applicant because the information consisted of personal views or opinions of the author, including about the applicant.

3.6 Applicant's Personal Information – Both parties proceeded on the basis that the records contain personal information of the applicant consisting of the author's views or opinions about her. I have therefore decided that, despite my finding that personal views or opinions are not involved here, it is desirable to deal with the parties' arguments about those supposed views or opinions. The latter part of this section then deals with factual personal information of the applicant found in the e-mails.

So-Called Opinions About the Applicant – I should first describe the basis for my conclusion that the parties agree we are dealing with the author's opinions about the applicant. For her part, the applicant expressly argued that the records contain this kind of personal information. At p. 8 of its initial submission, the Ministry argued that it would not be possible, under s. 22(5) of the Act, to prepare summaries of the applicant's personal information. At p. 10, the Ministry referred to the "comments made" by the author as records created by that person in his private capacity. At p. 3 of the Ministry's reply submission, it addressed the applicant's characterization of this kind of personal information without arguing that personal information of the applicant is not involved here. Based on these passages, and other aspects of the Ministry's arguments in this case, I draw the conclusion that the Ministry agrees this kind of personal information of the applicant is in issue here.

The Ministry acknowledged, at p. 8 of its initial submission, that "one of the Act's premises is that individuals have a *prima facie* right to access their own personal information". The Ministry also argued, however, that s. 22 would require the applicant's own personal information be withheld from her, if disclosure of that information would unreasonably invade the personal privacy of another individual. As the Ministry put it, at p. 8 of its initial submission, the Act places limits on an individual's *prima facie* right of access to her own personal information "where appropriate." According to the Ministry, one limit is "where disclosure of an applicant's own personal information would unreasonably invade the personal privacy of a third party." This argument by the Ministry related both to the applicant's factual personal information and supposed 'opinions' about the applicant.

I agree that in certain circumstances an individual's right of access to his or her own personal information will be overridden where disclosure of that information would unreasonably invade the personal privacy of a third party. Section 22 clearly contemplates this possibility. For example, s. 22(5) – which is discussed below – prevents an individual from having access to "personal information supplied in confidence about" that individual where its disclosure would reveal the identity of the third party who supplied that personal information. Section 22(3)(h) also acknowledges this possibility, since it protects the identity of the third party who has supplied a "confidential personal recommendation or evaluation, character reference or personnel

evaluation" about someone else. It must be underscored, however, that the decision as to whether an applicant's access to her or his own personal information would unreasonably invade someone else's personal privacy has to be made under s. 22 as a whole.

In this case, even if one could characterize the author's work product as "anyone else's opinions about" the applicant, the discussion below demonstrates that, in my view, disclosure of those opinions to the applicant would not unreasonably invade the personal privacy of the author or anyone else.

How would disclosure to the applicant of opinions about the applicant *unreasonably* invade the personal privacy of the third party who expressed those opinions? The Ministry argued that disclosure would reveal the identity of the individual who supplied the opinions in confidence. It argued that, although s. 22(5) of the Act requires a public body to disclose a summary of such personal information to the applicant, such a summary could not be provided here without disclosing the identity of the author.

The Ministry's s. 22(5) argument is dealt with below in some detail. The main reason that argument is not persuasive is because it focuses on s. 22(5) instead of the rest of s. 22. It is clear – among other things, from the introductory words to s. 22(2) – that the s. 22 analysis must be performed using the tools provided by ss. 22(1), (2), (3) and (4). Section 22(5) is relevant only if a public body concludes, under those other aspects of s. 22, that disclosure to an applicant of his or her own personal information would unreasonably invade the personal privacy of a third party. Section 22(5) is intended to strike a limited balance, where possible, between third party personal privacy and an applicant's presumptive right of access to her or his own personal information. It seems to me the Ministry instead has used s. 22(5) as a tool to determine the substantive privacy issue in this case. Having considered the matter carefully – in light of ss. 22(1), (2), (3) and (4) – it is my view that disclosure to the applicant of opinions about her would not, in this case, unreasonably invade the personal privacy of the author or anyone else. Accordingly, s. 22(5) does not even enter into the picture. Even if s. 22(5) were relevant here, however, the following discussion explains why I find, in the alternative, that the Ministry cannot properly rely on that section in any case.

As I understand it, the Ministry says the opinions expressed about the applicant in the e-mails cannot be disclosed to the applicant because disclosure of this information, or summaries of it, will disclose the identity of the author. At p. 8 of its initial submission, the Ministry made the following argument:

> The Applicant knows the identity of the Third Party [*i.e.*, the author]. Therefore it is not possible to prepare and disclose to the Applicant summaries of the information about her that appears in the records, without disclosing the identity of the Third Party [author].

Even if the applicant actually did not know, for certain, the author's identity, this statement in the Ministry's submission almost certainly will have confirmed that identity for the applicant. There is also some indication in the other material before me that the applicant would have learned the author's identity from other sources, *i.e.*, the media.

I fail to see how disclosure of the actual e-mails, or summaries of them, matters at all on the issue of identity, since the applicant either already knew the author's identity or learned it from the Ministry's initial submission itself.

Further, the Ministry has not established either that the personal information was "supplied" within the meaning of s. 22(5) of the Act or that any such supply was "in confidence". The Ministry tried to argue there had been a confidential supply of information for the purposes of s. 22(5). The following passage is taken from p. 10 of the Ministry's initial submission in this inquiry:

> The records consist entirely of email messages sent by the Third Party [author] in his private capacity to other individuals. None of the content of the email messages is in any way connected to the Third Party's position as a government employee in the Public Body [*i.e.*, the Ministry]. The activities revealed in the records are activities of the Third Party as a private citizen, and not activities of the Public Body. The comments made by the Third Party were made in his private capacity, and as such the Public Body is not accountable for them.

The Ministry, at p. 11 of its initial submission, conceded that the author did not supply the information to the Ministry:

> The information was supplied by the Third Party to other individuals. It was not "supplied" to the Public Body except in the broadest sense by being placed on the Public Body's email system.

It seems to me that none of the information in the e-mails was "supplied" to the public body by the author. Section 22(5) is intended, in my view, to protect the identity of a third party only in cases where that third party has "supplied" personal information about someone else to a public body for the purposes of the public body's performance of its functions. It is not intended to protect the identity of a third party where information about another individual somehow happens to end up in the files of a public body. Restoration of the e-mails from backup tapes during the course of a Ministry investigation is not a supply of personal information to the Ministry. Clearly, the personal information existed in some recorded (and probably unintelligible) form in backup tapes that were already in the Ministry's custody or under its control when the disciplinary investigation began. Manipulation of that information to reconstruct the disputed e-mails does not constitute a 'supply' of that same personal information to the Ministry. In the circumstances of this case, I conclude that the applicant's personal information was not "supplied" by the third party to the Ministry within the meaning of s. 22(5) of the Act.

Even if this personal information had been "supplied" to the Ministry for the purposes of s. 22(5), I find the Ministry has failed to establish the information was supplied "in confidence" for the purposes of that section. At p. 11 of its initial submission, the Ministry contended, in the following passage, that the necessary element of confidentiality was present:

> In any event, it is clear in the circumstances that the Third Party [author] had an expectation of confidentiality when he created the email messages. He expected that not even the Public Body would become aware of their existence. Accordingly, the Public Body submits that the information should be regarded as having been supplied in confidence … .

The Ministry also argued, again at p. 11, that because the e-mail messages had been retrieved from backup tapes in the course of an investigation, and because the investigation was conducted in confidence, the information "should be regarded as having been supplied to the Public Body in confidence". These submissions were made in relation to the Ministry's argument about s. 22(2)(f), which is discussed further below.

These arguments are not enough, on their own, to establish the necessary element of confidentiality for the purposes of s. 22. The Ministry provided no evidence to support its submission that the author had a reasonable expectation of confidentiality when the e-mails were created or sent. The Ministry's submission on the author's expectations is speculative. The Ministry has no way of knowing what expectations the author had when he wrote the e-mails. The author, however, made submissions touching on the confidentiality issue. He had the following to say, at p. 1 of his submission, about the private nature of the e-mail messages as a whole:

> The documents were created and transmitted as my personal and private documents, intended only for the eyes of the recipient. As such, I deliberately deleted them immediately upon transmission to ensure personal privacy and security. Such privacy and security were my expectations in deleting the documents, just as they would be if the document had been a personal paper document locked in a file drawer or put through a shredder.

This provides some evidence that the e-mails were intended to be "private". On the other side of the ledger, the applicant argued, at p. 4 of her reply submission, that there could be no reasonable expectation of privacy or confidentiality respecting these e-mails. She noted the British Columbia government's e-mail policy says "all e-mail and associated system resources are the property of the Government … its use and content may be monitored." The applicant also noted the government's e-mail policy stipulates that "e-mail usage must be able to withstand public scrutiny."

In my view, the author had no reasonable expectation of privacy or confidentiality when he used the Ministry's e-mail system in the way he did. Accordingly, even if the e-mails contained personal information about the applicant that had been "supplied" to the Ministry within the meaning of s. 22, that personal information was not supplied "in confidence" within the meaning of s. 22.

My finding on the confidentiality issue is in the alternative to the finding, discussed above, that the Ministry has not made its case regarding 'supply' of personal information for the purposes of s. 22 (including s. 22(5)). Of course, as the discussion above indicates, my primary finding is that the Ministry has failed to establish that disclosure to

the applicant of the e-mails would unreasonably invade the personal privacy of the author or anyone else.

Factual Personal Information of the Applicant – I will deal now with the Ministry's refusal to disclose other personal information of the applicant. The e-mails undoubtedly contain personal information of the applicant, *i.e.*, the applicant's name and other factual information about her. In my view, the Ministry has not established that disclosure to the applicant of her other personal information in the e-mails would unreasonably invade the personal privacy of the author or anyone else. Nothing the material before me supports such a conclusion, which means the applicant is entitled to have access to her own personal information in the e-mails. I have arrived at this conclusion in light of ss. 22(1) through (5) of the Act. As was indicated earlier in this order, I would make the same finding even if the applicant bore the burden of proof for all purposes of this inquiry.

3.7 Author's Personal Information – The Ministry contended that disclosure of the e-mails to the applicant would unreasonably invade the author's personal privacy. Again, I have found the e-mails do not contain the author's personal views or opinions. This means no privacy invasion issues arise in relation to that kind of personal information.

As was noted above, s. 57(2) provides that the applicant bears the burden of establishing that disclosure of the author's personal information would not constitute an unreasonable invasion of his personal privacy. For the following reasons, I have concluded the applicant has met that burden and that the Ministry was not required by s. 22(1) to refuse to disclose the author's personal information to the applicant. The following reasons apply even if personal views or opinions of the author are involved here. They also apply to factual personal information of the author found in the e-mails.

The Ministry argued that disclosure of the e-mails would constitute a presumed unreasonable invasion of the author's personal privacy under ss. 22(3)(b) and (d) of the Act. The relevant portions of s. 22(3) read as follows:

> (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,
>
> ….

The Ministry argued that the presumed unreasonable invasion of personal privacy described in s. 22(3)(b) applies here. At p. 9 of its initial submission, the Ministry said the "records were retrieved from back up tapes as part of a disciplinary investigation into

the Third Party's [*i.e.*, the author's] use of a government email system for personal purposes." Accordingly, the Ministry said,

> … s. 22(3)(b), or at least the premise underlying it, renders disclosure of the records a presumed unreasonable invasion of the Third Party's privacy … .

The Ministry did not point to any "law" the possible violation of which was involved here. The Ministry's own submissions in effect characterize its investigation as a disciplinary investigation conducted by the Ministry as the author's employer.

In my view, the ordinary meaning of s. 22(3)(b) is against the Ministry on this point. One does not normally think of an employment-related disciplinary investigation, with no statutory disciplinary flavour, as involving a "prosecution" of a "violation of law". An employer's contractual right – under an individual employment contract or a collective agreement – to discipline an employee for misconduct is not, in my view, a "law" for the purposes of this section. Nor can I accept the Ministry's apparent invitation to extend s. 22(3)(b), by analogy, to this information. If s. 22(3)(b), given its ordinary meaning, does not apply to the disputed information, I have no authority to force it to fit. Nor does the Ministry.

The Ministry's next point was that disclosure of the e-mails would constitute a presumed unreasonable invasion of the author's personal privacy because the e-mails "were retrieved as part of a disciplinary investigation, and now form part of the Third Party's personnel file" (p. 9). The Ministry noted, at p. 9, that my predecessor decided "disclosure of the contents of a public body employee's personnel file would be an unreasonable invasion of that employee's personal privacy." (As examples, the Ministry cited Order No. 52-1995 and Order No. 81-1996.)

The e-mails themselves have nothing to do with the author's employment with the Ministry. This is clear from the Ministry's submissions, the author's submissions and the e-mails themselves. The only personal information of the author found in the e-mails is the author's name, telephone number and other contact particulars. As the author said in his submission, and as the Ministry also observed, the e-mails' contents themselves do not relate to his employment with the Ministry. Among other things, because the e-mails (of necessity) pre-date the Ministry's disciplinary investigation regarding the author, they are silent about that investigation.

The only connection between the e-mails and the author's employment history is the Ministry's disclosure, in this inquiry, that the e-mails were retrieved as part of a disciplinary investigation and the Ministry's contention that they now "form part of the Third Party's [author's] personnel file." The material before me also indicates the Ministry had, independent of and before, this inquiry previously told the applicant about the disciplinary investigation. The Ministry presumably decided it was at liberty to disclose this information. It cannot, in my view, use that disclosure to create a s. 22(3)(d) argument. The presumed unreasonable invasion of personal privacy created by that section applies where the personal information itself "relates to employment, occupational or educational history". Here, the records themselves contain no such

personal information. The only connection between the author's employment history and the records is the Ministry's disclosure of that connection.

For clarity, it should be emphasized that the contents of a record do necessarily not qualify as part of someone's personnel file simply because that record is physically located in the file. For example, if an employee's telephone bill for her personal residential telephone line somehow ends up in that employee's personnel file, that record does not – by virtue of its location in the file – become personal information that "relates to employment, occupational or educational history" of that employee. The telephone bill will contain the employee's personal information, but it is not related to her employment, occupational or educational history by virtue of its location.

Since I have determined that none of the presumed unreasonable invasions of personal privacy set out in s. 22(3) applies in this case, the next question is whether there is any other basis for concluding that s. 22(1) prohibits disclosure of the e-mails in order to protect the personal privacy of their author. This is necessary because s. 22(1) may prohibit disclosure of personal information even if one of the presumed unreasonable invasions of personal privacy described in s. 22(3) does not apply. The Ministry did not make any submissions that explicitly addressed this point. This means I cannot determine what other ground, if any, the Ministry had for its decision that it was required by s. 22(1) to refuse to disclose the records to the applicant. For the purposes of this inquiry, at least, the Ministry only made submissions in relation to ss. 22(3)(b) and (d). For the reasons just given, those provisions do not apply.

Nor do I see any other basis on which the Ministry could reasonably have concluded that disclosure of the author's personal information would unreasonably invade his personal privacy within the meaning of s. 22(1). Again, the e-mails contain some personal information of the author, but the personal information is innocuous. The author's name – which is already known to the applicant, according to the Ministry – is found in the various e-mails. So is his job title within the Ministry, his work telephone and fax numbers, and a Website apparently associated with part of the Ministry. Some of this information technically qualifies as "personal information" about the author, but the personal information is work-related. The e-mails do not, to say the very least, include recorded information about the author's personal life. Section 22(4)(e) of the Act says that it "is not an unreasonable invasion" of the author's personal privacy if personal information is disclosed about his "position" or "functions" as a Ministry employee (which would entail disclosing the author's name as well). Even if there is personal information of the author in the e-mails that is not covered by s. 22(4)(e), it is my view that disclosure of the other personal information would not unreasonably invade the author's personal privacy. The reasons for this conclusion follow. It is based on my assessment of the situation in light of s. 22(2) and the rest of s. 22.

The parties made a number of submissions on the question of whether the relevant circumstances favour disclosure of the author's personal information or the withholding of that information. They did so because s. 22(2) of the Act says that a public body must, in determining whether a disclosure of personal information constitutes an unreasonable

invasion of a third party's personal privacy, "consider all the relevant circumstances". The relevant circumstances include those set out in ss. 22(2)(a) through (h). Section 22(2) makes it clear that a public body must, for the purposes of s. 22(1), consider the relevant circumstances even if none of the s. 22(3) presumed unreasonable invasions of personal privacy applies. In analyzing the s. 22(2) issues below, I have kept in mind that the relevant circumstances – including those described in s. 22(2) – must be considered in relation to disclosure of the author's personal information, not other information in the e-mails generally.

For its part, the Ministry said the relevant circumstances described in ss. 22(2)(a), (e), (f) and (h) favour a determination that disclosure of the personal information would unreasonably invade the author's personal privacy. Section 22(2)(a) says that a public body must consider whether disclosure of personal information "is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny". The Ministry argued, at p. 10 of its initial submission, that disclosure would "not further the goal of subjecting the activities of the Public Body to public scrutiny" because the "records consist entirely of email messages sent by the Third Party [author] in his private capacity to other individuals."

At page 5 of the applicant's initial submission, the applicant argued that s. 22(2)(a) favours disclosure because the disputed e-mails were created by the author "during his employ [*sic*] at the Ministry of Finance and Corporate Relations offices". The applicant said disclosure would subject the Ministry to public scrutiny because it would enable the applicant or others "to learn how government employees make use of government offices and their positions as government employees" (p. 5 of the applicant's initial submission). At p. 4 of the applicant's reply submission, the applicant argued that the Ministry "cannot claim that the activities of its employees during their employ [*sic*] and use of government systems are not activities" of the Ministry.

I do not agree with this argument by the applicant. As was noted above, it is clear from the material before me that these e-mails were written by the author in his personal capacity and not in the discharge of his employment responsibilities. Both the author and the Ministry conceded this. Disclosure of the minimal amounts of the author's personal information found in the e-mails would not assist in subjecting the activities of the government of British Columbia to public scrutiny. Without getting into this in any detail, as a general rule, private actions by an employee, using the employer's resources without the knowledge or control of the employer, are not activities of the public body for the purposes of the Act. The applicant repeated her argument on this point on the basis that the author's role with a local government body triggered the public scrutiny interest expressed in s. 22(2). For the reasons just given, I do not agree with the applicant's second argument on this point.

The Ministry argued that s. 22(2)(e) is relevant here. That provision says a public body must, in determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, consider whether the "third party will be exposed unfairly to financial or other harm". The Ministry said my

predecessor had ruled "that this paragraph addresses harm of varying degrees and of many types" (p. 11 of the Ministry's initial submission). The Ministry's argument on this point was brief. The Ministry simply asserted that disclosure "of some of the withheld information" would expose the author (and other third parties, who received the e-mails) to financial or other harm and that this was "unfair" because the author "intended the e mails to be private". The Ministry did not elaborate on the nature of any possible financial harm or other types of possible harm. Nor did the Ministry say how it would be unfair to expose the author (or other third parties) to financial or other harm.

The author's subjective intention that the e-mails were to be private does not mean disclosure will expose him or anyone else to financial or other harm. Further, even if financial or other harm could possibly flow from disclosure, no reason has been given why that exposure would be "unfair". It is not, in my view, self-evident that any exposure to harm would be "unfair" (assuming for argument's sake the necessary exposure to harm had been established). Whether exposure to financial or other harm is "unfair" for the purposes of s. 22(2)(e) very much depends on the circumstances of each case.

The Ministry provided no evidence to support its argument on this point and did not develop its reasoning any further. The author made both *in camera* and open submissions on the s. 22(2)(e) issue. He made some *in camera* assertions – that I cannot disclose here – that he felt supported him on this point. I have considered all of the submissions about s. 22(2)(e) very carefully in light of the material before me (including about newspaper coverage of this matter and the author's role in the underlying land use matter). I am not persuaded that the relevance of the circumstance described in s. 22(2)(e) has been established. In any event, I find that it would not favour a finding of unreasonable invasion of personal privacy in this case.

As for the relevant circumstance expressed in s. 22(2)(f), that section says a public body must, in deciding whether disclosure of personal information would constitute an unreasonable invasion of personal privacy, consider whether the "personal information has been supplied in confidence". As was noted above, the Ministry said the personal information in this case had been supplied to the Ministry in confidence. For the reasons given above, I find that personal information in this case was not "supplied" to the Ministry within the meaning of s. 22 and that the necessary element of confidentiality also has not been established within the meaning of that section. Of course, even if such a confidential supply of personal information had been established, s. 22(2)(f) sets out only one relevant circumstance that must be considered in deciding whether the personal information must be withheld or whether it can be disclosed. In the alternative, I find that the circumstance described in s. 22(2)(f) would not favour a finding of unreasonable invasion of personal privacy in this case.

The last relevant circumstance advanced by the Ministry, and by the author, is set out in s. 22(2)(h) of the Act. It requires a public body to consider, in determining whether disclosure of personal information would constitute an unreasonable invasion of a third party's personal privacy, whether "the disclosure may unfairly damage the reputation of a

person referred to in the record requested by the applicant." Here is the Ministry's argument on this point (from p. 12 of its initial submission):

> The Public Body submits that disclosure of some of the information in the email message could damage the reputation of certain individuals. The Public Body further submits that this damage would be unfair, in that the third party [author] intended the email messages to be private, and had he not used a government email system to convey them there would not even be the potential for them to be disclosed by anyone other than the parties to them.

As with the Ministry's s. 22(2)(e) case, no further evidence or argument was provided on this point. The author, however, made *in camera* submissions on the s. 22(2)(h) issue. Those submissions cannot be disclosed in this order. As is the case with the author's s. 22(2)(e) submissions, the s. 22(2)(h) submissions I have considered those arguments carefully, including in light of the other material in this case. I find that s. 22(2)(h) is not a relevant circumstance here. Even if it were relevant, I find in the alternative that it does not favour a finding that disclosure of the *personal information* of the author would be an unreasonable invasion of his personal privacy in this case.

Two other circumstances are relevant to the s. 22(2) analysis. First, the contents of the e-mails would not themselves necessarily unfairly damage the reputation of the author or anyone else. It seems to me that any concern about reputation here, from the author's perspective, has to do more with the fact of his use of the Ministry's e-mail system to create and send the e-mails than with the contents of the e-mails themselves. The applicant and the public are aware of what the author did. Two newspaper articles and one newspaper editorial were submitted as part of the applicant's evidence in this inquiry. The articles and the editorial discuss the author's involvement in the land use matter, including in relation to the e-mails he sent to the developer and the assistance provided to the developer in those e-mails. The second relevant circumstance is the fact the author occupied an official (appointed) position on a local government body that was involved in the land use matter to which the e-mails relate. To my mind, these considerations cut against any contention that disclosure of the author's personal information in the e-mails would – and I emphasize the word – *unreasonably* invade the author's personal privacy (even if his privacy were in issue within the meaning of the Act).

3.8 Personal Privacy of Other Third Parties – According to the Ministry, disclosure of the records would unreasonably invade the personal privacy of other third parties. As was noted above, the e-mails contain the names, telephone numbers and positions of several individuals other than the applicant and the third party who wrote the e-mails. The Ministry did not argue that any of the s. 22(3) presumed unreasonable invasions of personal privacy applied in respect of the personal information of those other individuals.

The Ministry did argue, though, that disclosure of the names, telephone numbers and positions of the other individuals would unreasonably invade their personal privacy within the meaning of s. 22(1). It argued that ss. 22(2)(a), (e), (f) and (h) favour a

determination that disclosure of that personal information would constitute an unreasonable invasion of the personal privacy of those other individuals.

The third party personal information arises in relation to a public dispute about land use. Nothing in that information – or in the circumstances brought home to me surrounding its creation or release – supports the view that an unreasonable invasion of third party personal privacy would result from disclosure of the personal information in the records. I find that disclosure of the third party personal information in issue would not unreasonably invade the personal privacy of the other third parties whose personal information is in the records. This finding is based on my assessment of the personal information and the circumstances of this matter (including, as regards ss. 22(2)(a), (e), (f) and (h), for the reasons given above in relation to the author's personal information).

As an aside, I note there is no evidence before me that the Ministry conducted third party consultations under s. 23 of the Act because it was of the view that an invasion of third party personal privacy was in issue. The author was the only third party who made representations in this inquiry.

3.9 Comments About the Duty To Sever – The Ministry decided to withhold all of the e-mail messages under s. 22(1). As the Ministry put it, at p. 12 of its initial submission:

> The Public Body has determined that, in all of the unique circumstances of this case, disclosure of the contents of the retrieved email messages would unreasonably invade the privacy of the Third Party [author] and of other third parties who received the email messages from the Third Party. Accordingly, the Public Body submits that it is required to withhold the records in their entirety under section 22. The Applicant bears the burden of proving the contrary.

I do not agree with this passage, particularly its last sentence. As is noted above, the applicant bears the burden of proof in this inquiry with respect to disclosure of personal information that would unreasonably invade the personal privacy of individuals other than the applicant. But this does not mean the Ministry is somehow excused, when it makes its original access decision, from reviewing the records, line by line, and severing the personal information that must be withheld.

Section 4(2) of the Act says that the right of access to a record does not extend to information excepted from disclosure, "but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record." This section requires the Ministry, when it makes its original decision, to sever and release information that is not excepted from disclosure. There is nothing "unique" about the circumstances of this case that makes it impossible to undertake the severing required by s. 4(2).

Even if the Ministry had been correct in deciding that it was required by s. 22(1) to refuse to disclose personal information, it should have severed that personal information from the records and disclosed the remainder. Most of the information in the e-mails is not

personal information and would have to be disclosed even if the Ministry had been correct in its s. 22(1) decision. None of the Act's other exceptions to the right of access was applied by the Ministry to the records. (This is not surprising, since it is extremely difficult to see how any of the Act's other exceptions to the right of access would apply.)

4.0 CONCLUSION

For the reasons given above, I find that the Ministry is not required by s. 22(1) of the Act to refuse to give the applicant access to the disputed records. Under s. 58(2)(a) of the Act, I require the Ministry to give the applicant access to all of the disputed records.

November 30, 1999

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David Loukidelis
Information and Privacy Commissioner
for British Columbia