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Order F13-09

CITY OF VANCOUVER

Ross Alexander, Adjudicator

April 16, 2013

Quicklaw Cite: [2013] B.C.I.P.C.D. No. 10

CanLII Cite: 2013 BCIPC No. 10

Summary: A City of Vancouver employee was suspended from work on two occasions. He requested all records regarding his suspensions. The City withheld records under ss. 13, 19(1)(a), and 22 of FIPPA. The adjudicator authorized the City to withhold certain records under s. 13, and required the City to withhold other records under s. 22. Sections 13 or 22 applied to all records. The adjudicator did not order disclosure of any records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13, 19(1)(a) and 22.

Authorities Considered: B.C.: Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order F11-17, [2011] B.C.I.P.C.D. No. 23; Order F07-17, [2007] B.C.I.P.C.D. No. 23; Order No. 218-1998, [1998] B.C.I.P.C.D. No. 11; Order F12-08, [2012] B.C.I.P.C.D. No. 12; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order F10-36, [2010] B.C.I.P.C.D. No. 54; Order 02-21, [2002] B.C.I.P.C.D. No. 21.

Cases Considered: *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665.

INTRODUCTION

[1] The applicant, a City of Vancouver (“City”) employee, requested all records relating to two instances in which the City suspended him from work.

[2] The City disclosed most of the responsive records, but withheld certain information under ss. 13, 19(1)(a), and 22 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

ISSUES

[3] The issues in this inquiry are:

1. Is the City authorized to refuse access to records as policy advice or recommendations under s. 13 of FIPPA?
2. Is the City required to refuse access to records as disclosure harmful to personal privacy under s. 22 of FIPPA?
3. Is the City authorized to refuse access to records as disclosure harmful to individual safety under s. 19(1)(a) of FIPPA?

DISCUSSION

[4] **Background**—The applicant is a City employee seeking all statements and information leading up to two occasions when he was suspended from work.

[5] **Records in Dispute**—The records in dispute consist of emails, handwritten notes, and other correspondence relating to incidents that resulted in two separate work suspensions.

[6] The City has disclosed most of the responsive records to the applicant. Most of the withheld information is excerpted segments of some of the records. Specifically, the withheld information consists of:¹

- a) the names of witnesses, sometimes including their job title or interview location (“Witness Names”);²
- b) interview notes of a party other than the applicant (“Party Interviews”);³

¹ Portions of pp. 399-12 to 34, 399-51 to 64, 399-67 to 70, 399-73 to 77, 399-79, 399-80, 399-85, 399-86, 399-100, 399-101, 399-105, 399-106, 399-129, 399-130, 399-139, 399-147 to 150, 399-161, and 399-162 have been severed. This is duplicate information that has already been disclosed to the applicant, or is specifically severed elsewhere in the records.

² Pages 398-19 to 22, 398-25 to 34, 398-52, 398-84 to 89, 399-99, 399-100, 399-121.

³ Pages 398-81 to 83, 398-92, 398-93.

- c) recommendations, disciplinary actions, medical treatments, and employment histories relating to third parties (“Other Employee Information”);⁴
- d) personal email addresses (“Email Addresses”);⁵ and
- e) a series of internal email exchanges between City personnel about potential discipline for the applicant (“City Internal Dialogue”).⁶

[7] **Policy Advice or Recommendations**—The City severed the City Internal Dialogue and a few pages of Other Employee Information⁷ under s. 13(1) of FIPPA, which reads in part:

- 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
- (2) The head of a public body must not refuse to disclose under subsection (1)
- ...
- (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.
- ...

[8] The principle underlying this exception has been the subject of many orders, including Order 01-15 where former Commissioner Loukidelis said:

[22] This exception is designed, in my view, to protect a public body’s internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations. ...⁸

[9] Numerous orders have considered the interpretation of s. 13(1) of FIPPA. For example, Adjudicator Boies Parker stated in Order F07-17 that when:

...making a determination regarding s. 13, a public body must first determine whether the material fits within the scope s. 13(1). If it does, the

⁴ Pages 398-48, 398-50, 398-54, 398-56, 398-76 (middle and bottom excerpt redactions), 399-75, 399-83, 399-123, 399-127.

⁵ Pages 399-1, 399-4, 399-6, 399-78, 399-121, 399-159.

⁶ Pages 398-37, 398-42, 398-44, 398-46, 398-57, 398-58, 398-59, 398-60, 398-62, 398-65, 398-67, 398-69, 398-70, 398-71, 398-75, 398-76 (top excerpt redaction), 399-7, 399-11, 399-24, 399-36 to 40, 399-45, 399-51, 399-66, 399-152 to 155, 399-158.

⁷ Pages 398-54, 398-76 (middle redaction), 399-123.

⁸ Order 01-15, [2001] B.C.I.P.C.D. No. 16; See also Order F11-17, [2011] B.C.I.P.C.D. No. 23.

public body must then go on to determine whether the material falls within any of the categories set out in s. 13(2). If the records at issue are caught by one of the categories under s. 13(2), the public body must not refuse disclosure under s. 13(1). If the public body determines that the material falls within s. 13(1) and is not caught by any of the s. 13(2) categories, the public body must then decide whether to exercise its discretion to refuse disclosure.⁹

[10] The City submits that the information withheld under s. 13 contains recommendations between City personnel relating to the preferred course of action regarding two disciplinary actions taken against the applicant, which do not fall under any of the exceptions listed in s. 13(2).

[11] The applicant submits that the City has applied s. 13 of FIPPA too broadly, and that disclosure of the severed records would not reveal advice or recommendations. The applicant says the City must disclose the withheld information because it includes the City general manager's reasons for suspending the applicant. The applicant says s. 13(2)(n) specifically provides that this type of information cannot be withheld.

[12] The City replies that the withheld information in the records does not contain a decision or reasons of the City general manager ("GM") regarding an adjudicative function.

[13] The British Columbia Court of Appeal has stated that the meaning of "advice or recommendations" encompasses "an opinion that involves exercising judgment and skill to weigh the significance of matters of fact", among other things.¹⁰

[14] Based on my review of the records, I find that the City Internal Dialogue and some of the Other Employee Information are "advice or recommendations" developed by or for a public body regarding the applicant's discipline.¹¹

Does s. 13(2)(n) apply?

[15] The applicant believes that the GM decided his discipline, notwithstanding disciplinary letters to the applicant from individuals other than the GM on City letterhead that state the discipline, provide the reasons for the discipline, and identify the writer as the decision-maker.¹² Based on my review of the submissions, and particularly the records, I do not agree with the applicant's submission. The GM's correspondence was advice or recommendations. None

⁹ [2007] B.C.I.P.C.D. No. 23 at para. 18.

¹⁰ *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, at paras. 110, 112 and 113.

¹¹ Pages 398-54, 398-76 (top and middle redactions), 399-123.

¹² Pages 398-35, 398-36, 399-71, 399-72, 399-143, 399-144.

of the withheld records, including the GM's correspondence, comprise a decision under s. 13(2)(n). Consequently, I find that s. 13(2)(n) of FIPPA does not apply to any of the records withheld under s. 13.

[16] I find that s. 13 of FIPPA applies to all of the records the City has withheld under s. 13, and it may refuse disclosure to the applicant on this basis.

[17] **Disclosure Harmful to Personal Privacy**—The City relies on s. 22 of FIPPA for all of the withheld information, except the City Internal Dialogue. Section 22(1) states:

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.

[18] Numerous orders have considered the proper analytical approach to s. 22.¹³ First, the public body must determine if the information in dispute is personal information. If so, it must consider whether any of the information meets the criteria identified in s. 22(4), in which case disclosure would not be an unreasonable invasion of third party personal privacy and s. 22(1) would not apply. If s. 22(4) does not apply, the third step for the public body is to determine whether disclosure of the information falls within s. 22(3), in which case it would be *presumed* to be an unreasonable invasion of third party privacy. If the presumption applies, it is necessary to consider whether or not the presumption has been rebutted by considering all relevant circumstances, including those listed in s. 22(2). As noted in Order 01-53 discussing this stage of the analysis:

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.¹⁴

[19] Section 22 of FIPPA only applies to “personal information”, which is recorded information about an identifiable individual other than contact information. All of the information the City has withheld under s. 22 is personal information. This includes the Email Addresses because the FIPPA definition of “contact information” relates to business contact information, and the Email Addresses are personal email addresses.

¹³ This paragraph is quoted from Order F12-08, [2012] B.C.I.P.C.D. No. 12 at para. 12, with minor amendments.

¹⁴ [2001] B.C.I.P.C.D. No. 56 at para. 24.

[20] The information cannot be withheld if the circumstances in s. 22(4) apply. In this instance, I find that s. 22(4) does not apply.

[21] There is a presumption that disclosure is an unreasonable invasion of privacy if any of the provisions in s. 22(3) apply. Section 22(3) states in part:

A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

- (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
...
- (d) the personal information relates to employment, occupational or educational history,
...
- (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,
- (h) the disclosure could reasonably be expected to reveal the content of a personal recommendation or evaluation, a character reference or a personnel evaluation supplied by the third party in confidence and the applicant could reasonably be expected to know the identity of the third party,
...
- (j) the personal information consists of the third party's name, address, or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

[22] The City submits that ss. 22(3)(h) and (j) apply. The applicant did not address s. 22(3) in his submissions.

[23] I find that the presumption under s. 22(3)(h) applies to portions of the Other Employee Information because the information is personal evaluations or personnel evaluations supplied in confidence by third parties, and the applicant could be expected to know the third party who supplied the information.¹⁵ The s. 22(3)(g) presumption applies to the same information, as this information relates to third parties.

[24] I find that s. 22(3)(j) does not apply to any of the withheld information because there is no evidence that this information would be used for mailing lists or solicitations.

¹⁵ Pages 398-48, 398-50, 398-54, 398-56, 398-76 (middle and bottom redactions), 399-123.

[25] Since s. 22 is a mandatory provision regarding the protection of personal privacy, I will also consider whether other s. 22(3) presumptions apply.

[26] It is apparent from the records that s. 22(3)(a) applies to some of the Other Employee Information because this information relates to medical treatments or evaluations.¹⁶

[27] Further, I find that s. 22(3)(d) applies to the Witness Names and Party Interviews because it is information recorded in the context of investigations into workplace incidents.¹⁷ Section 23(3)(d) also applies to some of the Other Employee Information because it discloses the employment history of employees other than the applicant.¹⁸

[28] To summarize, there is a presumption that disclosure of the Witness Names and Party Interviews would be an unreasonable invasion of third parties' personal privacy. The application of ss. 22(3)(a), (d), (g) and (h) also collectively create the same presumption with respect to all of the Other Employee Information. No presumptions apply to the Email Addresses.

[29] With respect to relevant circumstances in s. 22(2) of FIPPA, neither party provided submissions. I do not find that any of the circumstances are applicable, except for s. 22(2)(f) for portions of the Other Employee Information because the information was supplied in confidence.¹⁹ Consequently, the presumption that disclosure of the Witness Names, Party Interviews, and Other Employee Information would be an unreasonable invasion of privacy has not been rebutted.

[30] There was no argument from the parties regarding the Email Addresses, other than the City's position that it is "personal contact information...not routinely available through normal search channels." The applicant has the burden to prove that disclosure is not an unreasonable invasion of privacy due to s. 57 of FIPPA. However, he did not provide any evidence or argument in favour of disclosing the Email Addresses, and I find no factors favouring disclosing the private email addresses. Consequently, I conclude that the City is required to refuse to disclose the Email Addresses.

¹⁶ Pages 399-75, 399-83, 399-127.

¹⁷ Section 22(3)(d) applied to the names and occupations of third party witnesses in the context of a workplace accident investigation in Order F10-36, [2010] B.C.I.P.C.D. No. 54; Also see Order 01-53, [2001] B.C.I.P.C.D. No. 56.

¹⁸ Pages 398-54, 398-76 (middle and bottom redactions), 399-75, 399-127.

¹⁹ Pages 398-48, 398-50, 398-54, 398-56, 398-76 (middle and bottom redactions), 399-123; See Order 02-21, [2002] B.C.I.P.C.D. No. 21 for the test for the circumstances in which s. 22(2)(c) applies.

[31] In conclusion, I require the City to refuse to disclose the Witness Names, Party Interviews, Other Employee Information, and Email Addresses withheld under s. 22 of FIPPA.

[32] **Threat to Safety or Mental or Physical Health**—It is unnecessary for me to consider s. 19(1)(a) of FIPPA, since I have concluded that the City is required or authorized to withhold all of the disputed records under ss. 13 and 22 of FIPPA.

[33] The City did not provide fulsome evidence or submissions in support of its assertion that s. 19(1)(a) applies to the Witness Names, apparently due to its confidence that it would be successful under s. 22. However, parties are required to exhaust their evidence in the first instance and are not permitted to split their case. I parenthetically note that it is unlikely that the City would have been entitled to provide supplementary evidence or submissions to oppose disclosure under s. 19(1)(a) if the records were not otherwise withheld.

CONCLUSION

[34] For the reasons given above, under s. 58 of FIPPA, I order that the City is:

- a) authorized to refuse to disclose the City Internal Dialogue and portions of the Other Employee Information²⁰ under s.13 of FIPPA; and
- b) required to refuse to disclose access to the Witness Names, Party Interviews, Other Employee Information, and Email Addresses under s. 22 of FIPPA.

April 16, 2013

ORIGINAL SIGNED BY

Ross Alexander
Adjudicator

OIPC File No's: F12-48963
F12-48965

²⁰ Pages 398-54, 399-123, and the top and middle excerpts severed from 398-76.