



OFFICE OF THE
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Order F13-12

VANCOUVER POLICE DEPARTMENT

Hamish Flanagan, Adjudicator

June 28, 2013

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Summary: The applicant requested an audio recording of a 911 call made by a third party to the VPD. While the call contains some personal information of the applicant, the Adjudicator required the VPD to withhold the record because disclosure would be an unreasonable invasion of the third party's privacy under s. 22 of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 22.

Authorities Considered: B.C.: Order F07-04, 2007 CanLII 9595; Order F12-08, 2012 BCIPC 12; Order 01-53, 2001 CanLII 21607; Investigation Report P97-010, <http://www.oipc.bc.ca/investigation-reports/1257>; Order F08-02, 2008 CanLII 1645; Order F04-33, 2004 CanLII 43765; Order 03-24, 2003 CanLII 49202. **Ont.:** Order MO-2061, 2006 CanLII 50714.

INTRODUCTION

[1] The applicant requested an audio recording of a third party's 911 call ("recording") from the Vancouver Police Department ("VPD"). The applicant is the subject of some of the recording, and the applicant's voice can be heard at some points during the recording. This is because he was proximate to the third party at certain points during the recording.

[2] The VPD withheld the record under s. 22 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”), asserting that disclosure of the recording would be an unreasonable invasion of the third party’s personal privacy. The VPD offered the applicant a severed written transcript of the call and related police generated reports. This was not satisfactory to the applicant.

[3] The applicant requested that the Office of the Information and Privacy Commissioner (“OIPC”) review the VPD’s decision to withhold the recording.

ISSUES

1. Is the VPD required to refuse access to the recording because disclosure would be an unreasonable invasion of a third party’s personal privacy under s. 22 of FIPPA?
2. If the VPD is required to refuse access to the recording under s. 22, can any of the applicant’s personal information reasonably be severed from the recording and disclosed to them, as required by s. 4(2) of FIPPA?
3. If the VPD is required to refuse access to the applicant’s personal information under s. 22, is a summary of the applicant’s personal information in the recording required to be provided under s. 22(5) of FIPPA?

DISCUSSION

[4] **Record in Dispute**—The record is an audio recording of a 911 call made by a third party to the VPD.

[5] The VPD says they released a small portion of the recording that contains only the applicant’s voice but the applicant denies this. However the VPD provided evidence demonstrating that it did provide this excerpt to the applicant,¹ and also that it offered the applicant another copy of this portion of the recording upon request.² Therefore this portion of the recording is not an issue I need deal with in this inquiry.

[6] The VPD is withholding the remainder of the recording under s. 22 of FIPPA, which requires a public body to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s personal privacy.

¹ A copy of the letter from the VPD to the applicant disclosing the excerpt is Exhibit D in the affidavit in support of VPD’s submission.

² VPD reply submission at para. 6.

[7] **Section 22 Inquiry**—The proper approach to s. 22 in this inquiry involves four steps:³

- 1) Is the recording personal information?
- 2) If the recording is personal information, does it meet any of the criteria identified in s. 22(4), where disclosure would not be an unreasonable invasion of third-party personal privacy?
- 3) If none of the s. 22(4) criteria apply, would disclosure of the recording fall within any of the criteria in s. 22(3), whereby it would be presumed to be an unreasonable invasion of third-party privacy?
- 4) If s. 22(3) criteria apply, after considering all relevant circumstances, including those listed in s. 22(2), is any presumption rebutted?

Does the information constitute personal information?

[8] Section 22 of FIPPA only applies to “personal information”, “which is recorded information about an identifiable individual other than contact information”. I find that the recording comprises information about identifiable individuals including names, addresses, comments and opinions, and therefore is personal information. This finding is consistent with previous decisions involving 911 calls.⁴

Is disclosure of the personal information not an unreasonable invasion of a third party’s personal privacy?

[9] The applicant submits that s. 22(4)(b) of FIPPA applies to the record. Section 22(4)(b) states disclosure of personal information withheld under s. 22 is not an unreasonable invasion of privacy if:

there are compelling circumstances affecting anyone’s health or safety and notice of disclosure is mailed to the last known address of the third party,

[10] The applicant submits that he has been threatened by multiple people who wish to do him harm, and as a result he is greatly concerned. The applicant also expressed a safety fear to the public body. The public body requested further details about the safety concern from the applicant so it could properly consider s. 22(4)(b), but the applicant neither provided evidence to the VPD, nor provided details in his submission in this inquiry about the nature of these concerns.

³ This was the approach adopted in Order F12-08, 2012 BCIPC 12 and Order 01-53, 2001 CanLII 21607 which I adopt here.

⁴ See for example, Order F07-04, 2007 CanLII 9595; Investigation Report P97-010, <http://www.oipc.bc.ca/investigation-reports/1257>.

[11] Because of the lack of evidence to support the s. 22(4)(b) assertion, I find that there are no compelling circumstances affecting anyone's health or safety justifying disclosure of the recording. I also find that none of the other circumstances in s. 22(4) of FIPPA apply to the information withheld under s. 22.

Was the personal information collected as part of an investigation into a possible violation of law?

[12] The next step is to determine whether disclosure of the recording is presumed to be an unreasonable invasion of third-party privacy under s. 22(3). The VPD submits that s. 22(3)(b) applies to the recording. Section 22(3)(b) states that a disclosure of personal information is presumed to be an unreasonable invasion of a third-party's personal privacy if the personal information was compiled and is identifiable as part of an investigation into a possible violation of law.

[13] In Order F07-04⁵, then Commissioner Loukidelis found that a 911 audio tape triggered a police investigation into a possible violation of law, thus the record and its contents formed part of that investigation. This is what happened here and therefore I find that the recording is part of an investigation for the purposes of s. 22(3)(b). This creates a presumption that disclosure of the record is an unreasonable invasion of the third-parties' personal privacy.

[14] I find that none of the other s. 22(3) presumptions apply to the recording.

Relevant circumstances

[15] The next stage is to consider all relevant circumstances, including those listed in s. 22(2), to determine whether or not the presumption that disclosing the recording is an unreasonable invasion of privacy has been rebutted.

[16] The sections of s. 22(2) relevant to this case are:

22(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

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

(e) the third party will be exposed unfairly to financial or other harm,

⁵ 2007 CanLII 9595.

(f) the personal information has been supplied in confidence,

...

Fair determination of applicant's rights

[17] The applicant submits this factor is relevant because the recording “is the only piece of proof that exists which proves that the claim made against me was not true.”

[18] For s. 22(2)(c) to apply, the applicant's legal rights must be in issue.⁶ That legal right must relate to a proceeding which is existing or contemplated, not one that is completed; the personal information in issue must have some bearing on or be significant to the determination of the right in question; and the personal information must be required to prepare for the proceeding or to ensure an impartial hearing.⁷ The evidence before me is that the investigation was completed on the day of the call. There is no ongoing investigation or legal proceedings relating to the 911 call. Section 22(2)(c) is therefore not a factor in favour of disclosure.

Exposure to harm

[19] The VPD provided *in camera* submissions about possible harm that could result from the disclosure of the recording. I am not able to discuss the details of this submission, but I can say it supports withholding the recording.

Supplied in confidence

[20] In Investigation Report P97-010,⁸ then Commissioner Flaherty said the following:

...when a person calls 911 and seeks assistance the call, and any information supplied during the conversation with a 911 operator is in the strictest confidence.

...

...if confidential calls for help to 911 are accessible to third parties...it will seriously undermine the public's confidence in reaching out for emergency assistance for fear of a breach of personal privacy...

...

...where the subject of the request [for the 911 record] is specified and the released records concern that person, such a practice [of disclosure] is very invasive of the person's privacy.

⁶ Order F08-02, 2008 CanLII 1645, at para. 23.

⁷ Order F04-33, 2004 CanLII 43765, at para. 33.

⁸ <http://www.oipc.bc.ca/investigation-reports/1257>, at p. 3.

[21] While the applicant was physically proximate to the third party during some of the recording, I find that the third party's intention was that the call be confidential as between him and the 911 operator. It is clear from the recording that the call was only made with the applicant nearby because the third party felt compelled to request urgent assistance. These circumstances are, in my view, insufficient to rebut the position that 911 calls are typically strictly confidential. Therefore, I consider the confidential nature of the recording a factor that weighs against disclosure.

Other circumstances

[22] Several orders have found that an applicant's awareness or knowledge of the withheld information is a relevant circumstance that public bodies should consider in applying s. 22.⁹ This circumstance can favour disclosure of personal information in a given case, for example, if the applicant provided the personal information to the public body or is otherwise aware of the information. In this case the applicant sought access to the recording made partially in his presence which included the applicant's personal information.

[23] The applicant's physical presence during some of the recording could favour disclosure in this case. In Ontario Order MO-2061¹⁰, the Adjudicator ordered disclosure of one of two 911 tapes (or a transcript) because the evidence showed the applicant had been present during the call and had heard the entire conversation. The Adjudicator said that since the applicant knew the contents of the 911 call already, applying a presumption against disclosure would lead to an absurd result in the circumstances. The adjudicator acknowledged the absurd result principle may not apply if disclosure would be inconsistent with the purpose of the exemption. Upholding the purpose of the exemption may take precedence even when the information was supplied by the requester or is in the requester's knowledge. In my view, the circumstances in which the applicant heard the call in the present case distinguish it from the Ontario Order above. The applicant heard only some of the 911 call. He did so only because of the third party's perception that the circumstances required an immediate call to 911. These circumstances do not support the argument that the presumption against disclosure is rebutted.

Would disclosure be an unreasonable invasion of privacy?

[24] I conclude that the relevant circumstances in this case do not rebut the presumption that release of the recording is an unreasonable invasion of personal privacy. I therefore find that s. 22(1) requires the VPD to refuse to disclose the recording.

⁹ See, for example, Order 01-53, 2001 CanLII 21607 and Order 03-24, 2003 CanLII 49202.

¹⁰ 2006 CanLII 50714.

Severance of the applicant's personal information

[25] My conclusion regarding s. 22 is not the end of the matter, however. As the VPD acknowledges in its submissions, some parts of the recording contain the personal information of the applicant. I must consider whether the applicant's personal information can reasonably be severed from the third party's personal information. If so, the applicant has the right to access that part of the recording under s. 4(2) of FIPPA.

[26] The VPD argues it is not possible in this case, without disclosing the third party's personal information, to disclose the applicant's personal information in the recording, beyond that small portion that has already been provided to the applicant.

[27] I agree and find that the withheld information in the recording about the applicant is inextricably intertwined with the personal information of third parties, and cannot reasonably be severed such that the applicant's personal information can be disclosed.

[28] Some information, for example the third party's name, could be disclosed where it appears in the recording on the basis that the applicant already knows the third party's identity. I have, however, decided against this on the grounds advanced by the VPD, namely that with such severing the recording would be virtually meaningless. I am satisfied that the recording cannot, as provided by s. 4(2), "reasonably be severed".

Summary of the record under s. 22(5)

[29] Except in certain circumstances, s. 22(5) requires a public body to provide an applicant with a summary of their personal information if it cannot be disclosed under s. 22. The relevant parts of s. 22(5) state:

- (5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless
 - (a) the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information...

[30] The VPD submitted that s. 22(5) does not apply because of the presumption the recording is part of an investigation under s. 22(3)(b). However, s. 22(5) does still need to be considered in cases where the applicant's personal information has been supplied to a public body in confidence and is required to

be withheld under s. 22. Section 22(5) is relevant because as I have already found the personal information about the applicant was supplied in confidence, and the applicant's personal information is being withheld under s. 22. However, because the applicant knows the identity of the third party who placed the call, the VPD cannot prepare a meaningful summary without enabling a connection to be made between the information and the third party. This would undermine the finding under s. 22 that releasing the recording would be an unreasonable invasion of the third-party's personal privacy. Accordingly, I find that the exception in s. 22(5)(a) applies and the VPD is not required to provide the applicant with a summary under s. 22(5).

CONCLUSION

[31] For the reasons given above, under s. 58 of FIPPA, I order that the VPD is required to refuse to disclose access to the recording under s. 22 of FIPPA. The VPD is not required to provide the applicant with a summary report under s. 22(5).

June 28, 2013

ORIGINAL SIGNED BY

Hamish Flanagan, Adjudicator

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