



OFFICE OF THE  
INFORMATION & PRIVACY  
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Order F14-19

## BRITISH COLUMBIA FERRY SERVICES INCORPORATED

Vaughan L. Barrett  
Adjudicator

June 19, 2014

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**Summary:** The applicant requested information about herself held by BC Ferries, particularly information related to an incident that occurred during her work as an equipment operator. BC Ferries withheld information claiming ss. 13, 15, 19 and 22 of FIPPA exemptions. With the exception of its reliance on s. 13 and a few pages that must be disclosed, BC Ferries properly applied disclosure exemptions to the record.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 2, 3, 4, 6, 13(1) and (2); 15 (1)(a), (c), (d) and (l); 19(1)(b); 22(1), (2), (3)(d) and (4); 28, 29; *BC Interpretation Act*, s. 29.

**Authorities Considered:** **B.C.:** Order No. 71-1995, [1995] B.C.I.P.C.D. No. 44; Order No. 106-1996, [1996] B.C.I.P.C.D. No. 32; Order No. 323-1999, 1999 CanLII 779; Order 01-01, 2001 CanLII 21555; Order 00-02, 2000 CanLII 8819; Order 00-08, 2000 CanLII 9491; Order 00-51, 2000 CanLII 14416; Order 01-15, 2001 CanLII 21569; Order 01-18, 2001 CanLII 21572; Order 01-22, 2001 CanLII 21576; Order 01-53, 2001 CanLII 21607; Order 02-38, 2002 CanLII 42472; Order F06-11, 2006 CanLII 42572; Order F09-07, 2009 CanLII 21709; Order F11-28, 2011 BCIPC 34 (CanLII); Order F08-03, 2008 CanLII 57363; Order 01-07, 2001 CanLII 21561.

## INTRODUCTION

[1] The applicant, an employee of British Columbia Ferry Services Inc. (BC Ferries), requested copies of records in BC Ferries possession that referred to her including “letters, notes, reports, internal memos, emails, telephone notes, telephone records, marginal notes and audio recordings and electronic and digital media”.<sup>1</sup>

[2] BC Ferries provided the applicant with a copy of her personnel file, which it identified as responsive to her request, and noted that it withheld information that it was authorized or required to withhold under ss. 13, 15, 19 and 22 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[3] The applicant was dissatisfied with the information provided by BC Ferries and asked the Office of the Information and Privacy Commissioner (“OIPC”) to review BC Ferries’ decision. Mediation failed to resolve the dispute and the matter proceeded to a written inquiry under Part 5 of FIPPA.

## ISSUES

[4] The issues in this inquiry are as follows:

- (a) Is BC Ferries authorized under ss. 13(1) and (2), 15(1)(a), (c), (d) and (l) and 19(1)(b) of FIPPA to withhold information from the documents requested by the applicant?
- (b) Is BC Ferries required under s. 22(1) of FIPPA to withhold the requested information?

[5] Section 57(1) determines that BC Ferries carries the burden of proof to show the applicant has no right of access to those portions of the record it withheld under ss. 13, 15 and 19. However, s. 57(2) states that if portions of the record withheld contain personal information about a third party the applicant must show that its disclosure would not be an unreasonable invasion of the third party’s personal privacy under s. 22.

## DISCUSSION

### Background

[6] BC Ferries provides passenger and vehicle ferry services for coastal and island communities in British Columbia.<sup>2</sup>

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<sup>1</sup> Applicant’s original request at para. 3.

<sup>2</sup> BC Ferries is an independent commercial organization under the *Company Act*, and is governed by a board of directors appointed by the BC Ferry Authority.

[7] The applicant has been an employee of BC Ferries since 1989 and has served in a number of capacities including as an equipment operator (“EO”) at the Tsawwassen Ferry Terminal.

[8] In the early hours of June 19, 2012, an incident occurred during the untie and loading functions at Tsawwassen Terminal that involved equipment being operated by the applicant. As a result of the incident, a fact finding investigation was launched that led to the applicant having her EO certification suspended for eight weeks and being re-classified as a terminal operator. At the end of that period she was reinstated as an EO with a six-month probation attached.

[9] The applicant had concerns with “apparent errors, inconsistencies and inaccuracies”<sup>3</sup> in the information BC Ferries considered regarding the incident and believed that it had failed to follow its own policies and the collective agreement between BC Ferries and the applicant's union. On August 6, 2012, she filed a request with BC Ferries for all records that referred to her by any of the names she was known to use. She confirmed in that request that the records she was particularly interested in were those that related to her “job performance as an EO and/or terminal attendant at Tsawwassen Terminal”<sup>4</sup> from 2005 to present including any video recordings from the ship and shore video cameras showing untie and loading events between 4:30 am and 5:30 am on June 19, 2012.

[10] On September 24, 2012, BC Ferries provided the applicant with a copy of her personnel file and confirmed that some information in the record was exempted from disclosure pursuant to ss. 13, 15, and 22 of FIPPA. The letter explained the significance of those sections and advised that s. 22 dealt with third party disclosures and that BC Ferries would provide a further response following completion of its third party consultations.

[11] The applicant believed that there were other records held by BC Ferries that contained her known names so she asked the OIPC to review BC Ferries' response.

[12] During a period of follow-up discussions between the applicant, BC Ferries and the OIPC, further documents were uncovered and provided by BC Ferries before the matter was set down for an inquiry.

[13] The applicant complained that she had not been properly advised which sections of FIPPA BC Ferries had applied to the withheld information. In response BC Ferries provided the applicant with a table of records that clarified which sections of FIPPA it relied upon for withholding information.

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<sup>3</sup> Applicant's initial submission para. 6.

<sup>4</sup> Applicant's initial FOI request para. 4.

[14] On July 29, 2013, the applicant confirmed she had received 278 pages from BC Ferries including 47 pages that had some information severed and nine blank pages in which the information had been completely withheld. She voiced concerns that the severed and withheld pages had not been numbered, that the pages did not confirm which sections of FIPPA had been applied and that BC Ferries was relying on new exemption claims for the withheld information. In response, BC Ferries provided the applicant with a copy of the severed and withheld pages with page numbers affixed. Although the pages themselves did not refer to all of the FIPPA exemptions BC Ferries had applied, the table of records provided that information.

### **Record at Issue**

[15] There are 56 pages of records. The entire contents of nine pages have been withheld under ss. 15(1)(a), 15(1)(c), 15(1)(d), 15(1)(l), 19(1)(b) and 22(1), 22(2), 22(3)(d) and the remaining 47 pages contain information that was withheld under s. 13(1), ss. 15(1)(a), 15(1)(c), 15(1)(d), 15(1)(l), s. 19(1)(b), and ss. 22(1), 22(2), and 22(3)(d).

### **Preliminary Issues**

#### *Applicant's ss. 6 and 8 arguments*

[16] The applicant provided arguments based on ss. 6(1) and 8 of FIPPA in her initial submission despite the fact that these sections were not referred to in the Notice of Inquiry. BC Ferries objected to the applicant's "inappropriate attempt to broaden the scope of the inquiry"<sup>5</sup> and submitted that the applicant's arguments based on these sections should be disregarded.

[17] Past orders confirm that parties may raise new issues at the inquiry stage only if permitted to do so.<sup>6</sup> The applicant did not file an objection to the amended Notice of Inquiry within the three days allowed<sup>7</sup> and made no formal request that the Notice be further amended. However, in letters emailed to the OIPC dated July 19 and 25, 2013, the applicant requests to be allowed to make submissions based on s. 6 (she did not mention s. 8 in those letters). The letters were filed before the deadline for filing her initial submission. Although BC Ferries' initial submission does contain a response to the applicant's s. 6(1) arguments, it notes that its response was not intended to be comprehensive and it "reserves the right to file supplementary submissions"<sup>8</sup> should this inquiry allow the applicant's s. 6 arguments. Given the applicant's letters of request, I have decided to allow her

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<sup>5</sup> Part II A of BC Ferries' reply submission.

<sup>6</sup> See for example Order F11-22, 2011 BCIPC 28 (CanLII) at para. 9; Order F10-37, 2010 BCIPC 55 (CanLII) at para. 10.

<sup>7</sup> OIPC Instructions for Written Inquiries s. 4.1.1.

<sup>8</sup> BC Ferries' reply submission para. 18.

s. 6(1) submissions. Section 8 was not referred to in the applicant's July 19 and July 25, 2013 letters, so her arguments on that section will not be considered.

[18] Section 6(1) reads as follows:

The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

[19] The applicant claims BC Ferries failed in its duty to assist her as: it did not number the pages or provide a table of contents for the information it originally released; she was required, on a number of occasions, to inform BC Ferries that it had not provided information referred to in the table of contents it supplied; it did not provide her “with a means to ascertain she had received all the responsive records in its care and control.”<sup>9</sup> She claims that these circumstances confirm that BC Ferries failed to meet its s. 6 duties and its failure frustrates the purpose of FIPPA.

[20] BC Ferries identified the applicant's personnel file as responsive to her initial request and withheld some information following its consultations with third parties. Following its receipt of two complaints from the applicant that there must be further relevant information in her personnel file, BC Ferries completed further searches and provided four more pages to the applicant on February 8, 2013, and some additional pages on March 22, 2013. I note that BC Ferries did respond to the applicant's initial request within the 30 day time frame<sup>10</sup> and responded to the concerns subsequently raised by the applicant. The applicant has now received all of the information she requested (with the exception of the withheld information), all pages of the record have been numbered and details were provided on the disclosure exemption sections for which BC Ferries relies. Considering these circumstances, I am satisfied that BC Ferries has met its s. 6 obligations. Given this conclusion, I do not find it necessary to comment on BC Ferries' claim for the right to file supplementary submissions on the issue.

*Applicant's ss. 28 and 29 arguments*

[21] For the same reasons it objected to the applicant's arguments under ss. 6 and 8, BC Ferries objected to the applicant's arguments under ss. 28 and 29 of FIPPA,<sup>11</sup> which deals with a public body's duty to ensure personal information it

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<sup>9</sup> Applicant's initial submission at para. 36.

<sup>10</sup> The definition of “day” in FIPPA excludes Saturdays and holidays and under the *BC Interpretation Act*, [RSBC 1996] Chapter 238 s. 29, holidays include Sundays. By calculation BC Ferries responded to the applicant's request in 28 days.

<sup>11</sup> Applicant's initial submission at paras. 60-68.

holds is accurate and an applicant's right to request correction of personal information held by a public body. Neither s. 28 nor s. 29 were referred to in the Notice of Inquiry or the Investigator's Fact Report. Nor did the applicant refer to these sections in her July 19 and 25, 2013 letters, or ask permission during this inquiry to raise these issues. I will not consider the applicant's ss. 28 and 29 arguments. However, the applicant raises similar arguments under s. 22(2) for information withheld under s. 22(1) and I will consider those arguments in my s. 22 analysis.

*Applicant's claims regarding BC Ferries' ss. 15 and 19 exemptions*

[22] The applicant argues that BC Ferries failed to inform her of its “additional discretionary reliance” on ss. 15 and 19 exemptions and that its arguments under those sections should be disregarded. She submits that the table of records she received from BC Ferries on July 24, 2013, (16 days before her initial submission was due) was the first notice she had that BC Ferries would rely on ss. 15(1)(a), (c) and (d) for withholding information on nine pages of the record and s. 19(1)(b) for withholding information on 20 pages of the record. I infer from her arguments that the applicant believes she did not receive fair notice of the exemption claims and thus was not provided with an opportunity to make full submissions in response.

[23] The applicant refers to previous orders to confirm that as a general rule the OIPC will disregard arguments based on new exemptions raised at the inquiry stage.<sup>12</sup> She also refers to Order 01-22 where the public body notified the applicant and the OIPC shortly before the inquiry began that it intended to apply exemption clauses that were not referred to in the Notice of Inquiry.<sup>13</sup>

[24] I note that the Notice of Inquiry, issued June 26, 2013, and the Investigator's Fact Report issued June 25, 2013, confirm which FIPPA exceptions BC Ferries was relying upon and, on that basis, the cases cited by the applicant are distinguishable. The applicant herself affirms that by March 22, 2013, she had been advised by BC Ferries that it was relying on s. 19(1)(b) for withholding information in addition to ss. 13, 15 and 22.<sup>14</sup> It appears that the applicant's primary concern is that BC Ferries is claiming ss. 15 and 19(1) exemptions for information it had previously withheld under other FIPPA sections. However, although it is not encouraged, it is not impermissible or unusual before an inquiry begins, for parties to expand or narrow their application of the disclosure exemption provisions referred to in the Notice of Inquiry.

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<sup>12</sup> Order No. 106-1996, [1996] B.C.I.P.C.D. No. 32; Order 01-18, 2001 CanLII 21572.

<sup>13</sup> Contrary to what the applicant claims in Order 01-22, 2001 CanLII 21576, the adjudicator allowed (for limited purposes) the public body to make arguments based on exemption clauses not referred to in the Notice of Inquiry.

<sup>14</sup> Applicant's initial submission at para. 17.

[25] Although it appears that the July 24 notice the applicant received was her first notification which subsections of s. 15 BC Ferries was relying upon, in her initial submission she provides general and very specific arguments on why BC Ferries is unauthorized to claim ss. 15(1)(a), (c), (d) or (l) or s. 19(1)(b) disclosure exemptions.<sup>15</sup> I am satisfied that the applicant had sufficient notice of the applicable exemption sections and was not denied a reasonable opportunity to respond. I will consider the totality of BC Ferries' submissions on the information it withheld under ss. 15 and 19.

[26] As final comment on this issue, I note that the table of records BC Ferries provided does not confirm what portions of the pages of the record have been withheld under of ss. 15(1)(a), (c), (d) and 19(1)(b) and the severed pages themselves make no reference to ss. 19(1)(b) or 15(1)(a), (c) or (d). This did result in some confusion for the applicant and underscores the importance of public bodies marking on the record itself what is being withheld and what sections of FIPPA are being relied upon.

*Applicant's reference to the Collective Agreement and BC Ferries human resources policies*

[27] The applicant complains in paragraphs 106-111 of her initial submission, that BC Ferries breached its own employment practices as detailed in the collective agreement and its own human resources policies. Those arguments are outside the scope of FIPPA and will not be considered.

*The length of the applicant's submissions*

[28] BC Ferries submits that the applicant's initial submission far exceeds OIPC page limit guidelines and that "the Commissioner would be within her jurisdiction to disregard all pages which surpass the page limit".<sup>16</sup> Although it is always preferable for parties to comply with OIPC guidelines, the applicant included a number of documents with her submissions that were or could have been marked as appendices. I will allow the applicant some leeway and not disregard those pages that exceed the page limit.

*Right of Access under the Act*

[29] The applicant argues that s. 2, which defines FIPPA purposes, and s. 4, which confirms an applicant's general right of access to information, supports her argument that the withheld information must be disclosed.<sup>17</sup> Previous Orders have explained that "sections 2 and 4 do not, of themselves, provide specific bases for disclosure in a given case. Nor do they create exceptions to the right

<sup>15</sup> Applicant's initial submission at paras. 83-96.

<sup>16</sup> Footnote 1 of BC Ferries' reply submission.

<sup>17</sup> Applicant's submission at paras. 56-59.

of access. These sections are relevant in a general sense, but they do not determine whether specific information is to be disclosed or withheld on the facts of a case”.<sup>18</sup>

[30] I will now turn my attention to the parties submissions based on the issues identified in the Notice of Inquiry.

### **Application of s. 13**

[31] The relevant portions of s. 13 of FIPPA read as follows:

- 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)
  - (a) any factual material,
  - ...
  - (d) an appraisal,
  - ...
  - (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.

[32] BC Ferries only applied s. 13 to one line on the bottom half of p. 17 of the record and submits that it is a recommendation about a potential safety issue.<sup>19</sup>

[33] Consideration of s. 13 claims requires a two step approach. The first is to determine whether, in accordance with s. 13(1), the disclosure of the information “would reveal advice or recommendations developed by or for a public body or a minister”. If it does, it is necessary to consider whether the information at issue falls within any of the categories of information listed in s. 13(2) of FIPPA

[34] Disclosure exemptions allowed under s. 13(1) have been discussed in a number of orders and it has been held that:

The exception is designed...., 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.<sup>20</sup>

<sup>18</sup> Order 00-51, 2000 CanLII 14416 at para. 1, p. 5.

<sup>19</sup> BC Ferries' initial submission at para. 49.

<sup>20</sup> Order 01-15, 2001 CanLII 21569 at para. 22.

[35] The line withheld on the bottom half of p. 17 of the record is the third of three lines listed under the scribbled heading of “recommends”. The other two lines have not been withheld. The line comprises a short question and I am unable to conclude that it represents advice or a recommendation or information from which one could reasonably infer advice or a recommendation. Rather, it appears that the unidentified author simply jotted down a question, the answer to which may or may not lead to advice or a recommendation. I am not satisfied that BC Ferries is authorized under s. 13(1) to refuse disclosure of the line in question. BC Ferries also withheld the same line under s. 22(1) and I will determine whether it is required to do so in my analysis of s. 22.

### **Application of s. 19**

[36] I note that the same information BC Ferries withheld under ss. 15(1) was also withheld under s. 19(1)(b) of the Act. I will consider BC Ferries application of s. 19(1)(b) exemptions first then determine what issues remain to be resolved under s. 15.

[37] Although BC Ferries did not mark on the records precisely where it was applying s. 19(1)(b) to withhold information it provides that detail by way of a table of records that accompanies its initial submission.

[38] Section 19(1)(b) reads as follows:

The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

...

(b) interfere with public safety.

[39] Previous orders provide authoritative guidance for the application of s. 19(1). A public body must provide sufficient evidence to support the conclusion that disclosure of the information could reasonably be expected to cause a threat to one of the interests identified in the section. There must be a rational connection between the disclosure and the threat, and evidence of speculative harm will not suffice.<sup>21</sup>

[40] BC Ferries argues that public safety would be compromised if on-site employees fail to report behaviors, incidents or conditions that are or could be hazardous to passengers and/or staff. It further submits that if anonymity is not guaranteed to reporting employees, they may be reluctant to come forward for fear they will be labeled as “whistleblowers” and suffer repercussions from

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<sup>21</sup> Order 01-01, 2001 CanLII 21555; Order 00-02, 2000 CanLII 8819.

colleagues and/or supervisors. This concern is echoed in the affidavits of a number of BC Ferries' senior staff.<sup>22</sup>

[41] BC Ferries further argues that the pages it severed or withheld under s. 19(1)(b) are records of testimony given during confidential interviews or written statements provided in confidence and that their disclosure would result in a "reasonable expectation of interference with public safety."<sup>23</sup>

[42] The applicant argues that BC Ferries is incorrect in stating that it ensures witness confidentiality in its investigations and submits that all records relating to an employee's discipline are to be placed in the employee's file and made available to the employee. She further submits that there is no expectation of confidentiality for witness statements and that witness names and positions are routinely reported on BC Ferries safety and security webpage. As evidence she provides a copy of two such reports she apparently downloaded from the BC Ferries' webpage.

[43] In response BC Ferries provides an affidavit of its safety management system manager, who states that BC Ferries' policy is that witness names are to be removed from Site Investigation Reports and that the names the applicant accessed via BC Ferries' intranet page represent an administrative error that has now been corrected.<sup>24</sup>

[44] I have reviewed BC Ferries' safety procedures including its Voluntary Individual Safety Observations Reporting (VISOR) and its Learning Events Reported Today (ALERT) Handbook. Both of these systems depend on employee reporting of unsafe acts, unsafe conditions and near miss incidents. I note that the VISOR form confirms that "all Visors will be traced anonymously through the Operations Safety Log"<sup>25</sup> and the ALERT Handbook Process chart refers to an employee anonymously filing an Alert form with the ALERT coordinator.<sup>26</sup> I am satisfied that BC Ferries has adopted policies to ensure the confidentiality of witnesses in its fact finding investigations, and that those policies are based on a reasonable expectation that disclosure of the information would discourage some witnesses from reporting unsafe conditions that could ultimately interfere with public safety.

[45] I have concluded, in light of the priority that BC Ferries must place on public safety, that disclosure of the information withheld under s. 19(1)(b) could reasonably be expected to interfere with public safety.

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<sup>22</sup> See Affidavits of Darren Johnston at paras. 18, 21, 24; Chris Strange at paras. 5, 8, 12; David Hamilton at paras. 8, 16, 18.

<sup>23</sup> BC Ferries' initial submission at para. 77.

<sup>24</sup> Affidavit of Brad Judson, at para. 4.

<sup>25</sup> Darren Johnston's affidavit attachment at p. 29.

<sup>26</sup> Ibid attachment at p. 27.

### **Application of s. 15**

[46] The information BC Ferries withheld under ss. 15(1)(a), (c) and (d) was also withheld under s. 19(1)(b) of the Act. Given my conclusion on BC Ferries application of s. 19(1)(b), it is unnecessary for me to consider the application of ss. 15(1)(a), (c) and (d) to the records. However, this is not determinative of all s. 15 issues as BC Ferries also claimed that s. 15(1)(l) applies to part of the records.

[47] The relevant portion of s. 15 of FIPPA reads as follows:

The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

- (l) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

[48] BC Ferries applied s. 15(1)(l) as the sole basis for non-disclosure of three lines of information on p. 11 of the record and argues that disclosure of the lines would provide a “road map” to computer hackers that could reasonably be expected to harm the security of its computer or communication systems.<sup>27</sup> BC Ferries further submits that password information regarding a government email system is a “property or system” as referred to and covered by s. 15(1)(l). I note that the three lines in question consist of a website address, a User ID and a password that provide access to a report prepared by BC Ferries in 2006 regarding an illness suffered by the applicant.

[49] The applicant concedes that disclosure of User ID and passwords would compromise BC Ferries' communications or computer security and thus should not be disclosed. However, she argues that revealing the file pathway of BC Ferries IT system (I interpret this to mean the website address) would not compromise its security as such addresses are part of BC Ferries standard format for storing personal information. In support of her claim the applicant refers to two website addresses noted at the bottom of pp. 2 and 16 of the record that were not withheld.<sup>28</sup>

[50] In the absence of a User ID and password, I do not accept that disclosure of the website address could reasonably be expected to harm the security of BC Ferries' computer or communication systems. Accessing a website on its own does not allow a user to view all of the information on a website, in particular information that is encrypted with password protection. I conclude that the website address may not be withheld under s. 15(1)(l).

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<sup>27</sup> BC Ferries' initial submission at paras. 31-32.

<sup>28</sup> Applicant's initial submission at paras. 94-96.

**Application of s. 22**

*Withheld information no longer in dispute*

[51] The applicant states that she makes “no argument” for disclosure of the information BC Ferries withheld under ss. 22 in relation to email addresses, employee numbers and phone numbers of third parties. She submits that as a BC Ferries employee, she already has access to this information and that these records are not relevant to her request. She also confirms that she does not seek disclosure of information on pp. 50, 51 and 52 relating to employee injury reports as these pages are also not relevant to her request. Given this and my conclusion regarding what information was properly withheld under s. 19(1)(b), the only information that remains in issue is that which was withheld under s. 22 on pp. 1-7, 9, 16, 17 and 55. Accordingly, I will consider the application of s. 22 to that information.

[52] The relevant portions of s. 22 FIPPA read as follows:

- 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.
- 22(2) In determining under subsection (1) or (3) whether 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,
  - ...
  - (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,
  - (f) the personal information has been supplied in confidence,
  - (g) the personal information is likely to be inaccurate or unreliable,
  - (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and
- 22(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,

...

- (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.

22(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.

[53] Previous Orders have determined the tests to apply in determining whether public bodies are prohibited from disclosing information under s. 22(1) of FIPPA.<sup>29</sup> I adopt those tests here and apply them to the circumstances in this case.

*Is the requested information personal information?*

[54] FIPPA defines "personal information" as recorded information about an identifiable individual other than contact information.<sup>30</sup> "Contact information" is information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.<sup>31</sup>

[55] BC Ferries argues that the information it withheld under s. 22 involves a number of work circumstances in relation to identifiable individuals, thus all of the information qualifies as personal information that must be withheld.

[56] With the exception of the one line on the bottom half of p. 17 of the record that was discussed in my s. 13(1) analysis and a comment on p. 16, I accept that the information withheld reveals the names or initials of identifiable individuals and has been properly identified as personal information. The information on p. 17 and the comment about a work schedule on p. 16 are not about identifiable individuals, so they are not personal information. Therefore, they are not properly withheld under s. 22 and must be disclosed.

<sup>29</sup> See for example Order 01-53, 2001 CanLII 21607 at paras. 22-24.

<sup>30</sup> Schedule 1 of FIPPA.

<sup>31</sup> Ibid.

*Does s. 22(4) apply?*

[57] BC Ferries argues that none of criteria referred to under s. 22(4) applies and the applicant makes no specific argument under this section. However, p. 1 of the record simply lists identifiable individuals' positions or functions as employees of the public body as per s. 22(4)(e). I conclude that disclosure of that information would not be an unreasonable invasion of those individuals' personal privacy. BC Ferries must provide an unsevered copy of p. 1 to the applicant.

*Applicability of s. 22(3)*

[58] BC Ferries maintains that all of the personal information is either employee training schedules, names of crew members, scheduling information or work attendance records<sup>32</sup> and that its disclosure is presumed to be an unreasonable violation of the third parties' personal privacy under either ss. 22(3)(d), (g) or (h).

[59] My review of the records satisfies me that pp. 2, 6 and part of 16 refer to names of crew members on a particular shift; pp. 3, 4, 5, and 9 refer to scheduling information; p. 7 and the top half of p. 17 refer to work attendance records and p. 55 can be considered part of training records. There is nothing on those pages that refers to "personal recommendations or evaluations, character references or personnel evaluations" in relation to or provided by a third party so ss. 22(3)(h) and (g) do not apply.

[60] However, I agree with BC Ferries that s. 22(3)(d) applies to the personal information. Section 22(3)(d) applies to "information about a person's work history, leave transactions, disciplinary action taken, reasons for leaving a job and comments about an individual's workplace actions or behaviour in the context of a workplace complaint or discipline investigation."<sup>33</sup> I am satisfied that the information withheld on pp. 2-7, 9, 16, 17 and 55 is part of the employment, occupational or educational history of the identified individuals and that disclosure is presumed to be an unreasonable invasion of those person's personal privacy under s. 22(3)(d).

*Has the presumption been rebutted by relevant circumstances?*

[61] My consideration of the relevant circumstances included a careful review of the parties' submissions and the factors listed under s. 22(2).

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<sup>32</sup> BC Ferries' initial submission at para. 92.

<sup>33</sup> Order F08-03, 2008 CanLII 57363 at para. 92.

[62] The applicant argues that information withheld on pp. 2, 5, 6 and 16, is simply the names of persons who were on shift with her on June 12, 2012. She submits that she is well aware of who was on that shift and supplies the names of all those persons<sup>34</sup> and maintains that she is entitled to know that BC Ferries has accurately recorded that information. Having considered the information provided by the applicant, I am satisfied that she is aware of who was on that shift and she is not simply involved in guesswork. I accept that there would not be an unreasonable invasion of third-party privacy in providing the applicant with unsevered copies of pp. 2, 6 and 16. However, the withheld information on p. 5 will remain undisclosed as it relates to third parties' work and meeting schedules.

[63] The applicant also submits that disclosure of statements made by one of the witnesses would not be an unreasonable violation of that individual's personal privacy as she is aware of his identity and the "substance" of the statement he provided. She further submits that she is aware of four other witnesses who provided statements to BC Ferries relating to the June 19, 2012 incident, and it is therefore reasonable to disclose those statements as well.<sup>35</sup> She refers to Order F09-07 to support her argument on this issue. In that order the applicant was advised by the investigator in the fact finding process what third parties had stated about the incident and was given an opportunity to respond. Given this, and the fact that the applicant was involved in the incident, it was held that releasing witness statements to the applicant would not result in an unreasonable invasion of third-party privacy. The case is distinguishable from the facts in this inquiry where the applicant was not informed what third parties stated. I also accept BC Ferries' arguments that guess work by the applicant on the contents of exempted information (whether correct or not) is not a circumstance weighing in favour of disclosure of the information to the applicant.<sup>36</sup>

[64] The applicant maintains that disclosure of the withheld information is relevant to a fair determination of her rights as per s. 22(2)(c).<sup>37</sup> She maintains that her right to request a review of BC Ferries decision to refuse access has been compromised by its failing to confirm which disclosure exemptions it applied and the reasons for its non-disclosure.<sup>38</sup>

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<sup>34</sup> Applicant's initial submission at para. 137.

<sup>35</sup> *Ibid.* at para. 113.

<sup>36</sup> BC Ferries' Reply Submission at paras. 55-61.

<sup>37</sup> Applicant's initial submission at paras. 53, 147 and 178.

<sup>38</sup> *Ibid.* at para. 53.

[65] Previous orders<sup>39</sup> established that the following circumstances must exist before s. 22(2)(c) applies:

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.

[66] In applying this criteria to the applicant's submissions, I note that she does not suggest that there is existing or pending arbitration or other legal proceedings outside of this inquiry where her legal rights are to be determined. I conclude that s. 22(2)(c) does not apply in the circumstances of this case.

[67] The applicant also argues that she should be allowed access to the record as the personal information that BC Ferries holds on her is “very likely” to be inaccurate or unreliable [as per s. 22(2)(g)] and she has a right to correct it.<sup>40</sup> She maintains that BC Ferries has failed to follow its own investigative procedures designed to ensure the accuracy of information it receives<sup>41</sup> and that she has a right to view all records containing her personal information so that she can correct any inaccuracies.<sup>42</sup> I appreciate that the difficulty applicant's face under s. 22(2)(g) is that unless they are given access to the information requested it may prove impossible to determine its accuracy. Conversely, providing an applicant access to her personal information may, even inadvertently, serve to disclose information that has been lawfully withheld under FIPPA. Given that the applicant provides no evidence to support her belief that any of her personal information that BC Ferries holds is likely to be inaccurate or unreliable I am led to conclude that her submission is based on speculation and is unconvincing.

*Summarizing under. s. 22(5)*

[68] I have considered the severed and completely withheld pages of the record and am satisfied that BC Ferries cannot offer the applicant a summarized

<sup>39</sup> See for example Order 01-07, 2001 CanLII 21561 at paras. 31 and 32.

<sup>40</sup> Ibid. at para. 181.

<sup>41</sup> Applicant's initial submission at paras. 60-62.

<sup>42</sup> Ibid. at para. 67.

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version of those pages without identifying the third party who supplied the information. Therefore, s. 22(5) has no application to this inquiry.

## **CONCLUSION**

[69] Pages 1, 2, 6 and 16 will be released in their entirety to the applicant. BC Ferries was not authorized to withhold the information it did on the bottom half of p. 17 under s. 13(1), nor was it authorized to withhold the website address on p. 11 under ss. 15(1)(l). With the exception of those few instances, I am satisfied that BC Ferries properly applied the disclosure exemption provisions of FIPPA and is authorized to withhold information under s. 19(1)(b) and is required to withhold information under s. 22(1).

[70] For the reasons given, under s. 58 of FIPPA, I make the following orders:

1. I require BC Ferries to provide the applicant with unsevered copies of pp. 1, 2, 6 and 16 of the record.
2. I require BC Ferries to provide the applicant with an unsevered copy of the bottom half of p. 17 of the record and the website address referred to on p. 11 of the record. BC Ferries must provide the applicant with the documents noted by **July 31, 2014**, and concurrently, to copy me on its cover letter to the applicant along with the documents I have ordered disclosed.

June 19, 2014

## **ORIGINAL SIGNED BY**

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Vaughan Barrett, Adjudicator

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