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Order F14-26

MINISTRY OF JUSTICE

Elizabeth Barker, Adjudicator

July 28, 2014

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Summary: The complainant applied for a job with the Ministry and provided the names of references. The Ministry chose to speak to other individuals instead, without advising the complainant or obtaining her consent to do so. The complainant alleged that this was a collection of her personal information contrary to s. 26 and s. 27 of FIPPA.

The adjudicator determined that the collection of the personal information in question is not expressly authorized under an *Act* [s. 26(a)]. Further, while the personal information relates directly to the Ministry's hiring activities, it is not necessary for that activity [s. 26(c)]. The adjudicator also considered the manner in which the personal information was collected and found that the indirect collection was not authorized under the provisions claimed by the Ministry [ss. 27(1)(a)(iii) and 27(1)(b) in combination with ss. 33.1(1)(c) and (e) and ss. 33.2 (a), (c) and (d)]. The adjudicator orders the Ministry to stop collecting personal information in contravention of FIPPA and to destroy the personal information collected.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2, 26(a), 26(c), 27(1)(a)(iii), 27(1)(b), 33.1(1)(c) and (e), 33.2 (a), (c) and (d). *Public Service Act,* ss. 5 and 8.

Authorities Considered: B.C.: Insurance Corp. of British Columbia, [2000] B.C.I.P.C.D. No. 15; Order F07-18, 2007 CanLII 42407 (BC IPC); Order F07-10, 2007 CanLII 30395 (BC IPC); Order F13-04, 2013 BCIPC No. 4 (CanLII); Investigation P98-012, https://www.oipc.bc.ca/investigation-reports/1259; Investigation Report F10-02, 2010 BCIPC 13; Investigation Report F11-03, 2011 BCIPC No. 43; Investigation Report F12-01, 2011 BCIPC No. 5; Investigation Report F12-03, 2012 BCIPC No. 16.

ONT.: Privacy Complaint No. MC-020008-1, 2003 CanLII 53695 (ON IPC); Privacy Complaint No. PC-060004-1, 2006 CanLII 50784 (ON IPC); Vaughan (City) (Re), 2011 CanLII 47522 (ON IPC). **ALTA:** Order 2000-002, 2000 CanLII 28694 (AB OIPC).

INTRODUCTION

[1] This inquiry concerns a complaint by a job applicant ("complainant") that the Ministry of Justice ("Ministry") collected her personal information contrary to ss. 26 and 27 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[2] The complainant applied to work with Emergency Management BC ("Emergency Management"), which falls within the mandate of the Ministry. Emergency Management's Manager of Finance and Administration ("hiring manager") spoke with three individuals about the complainant's past work performance. The complainant had not offered names of those individuals as references, and she did not know until afterwards that they were asked to provide information about her past work performance.

[3] The complainant filed a complaint with the Office of the Information and Privacy Commissioner ("OIPC") alleging that by speaking to these individuals without her consent, the Ministry had collected her personal information, contrary to s. 26 and s. 27 of FIPPA. The complaint was investigated under s. 42(2) of FIPPA but was not resolved, and it proceeded to an inquiry under Part 5 of FIPPA.

[4] The BC Freedom of Information and Privacy Association ("intervenor") requested, and was granted, intervenor status in this inquiry.[1] The complainant, the Ministry, and the intervenor all provided an initial and a reply submission, and the Ministry and the complainant each provided a sur-reply.[2]

ISSUES

[5] The issues before me are as follows:

1. Was some or all of the information at issue the complainant's "personal information" as defined in FIPPA?

2. Was the Ministry authorized under s. 26 of FIPPA to collect the complainant's personal information?

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[1] The OIPC may permit organizations, agencies or individuals that have a broader interest and knowledge of the issues to participate in an inquiry as intervenor.

[2] The Ministry objected to the fact that the intervenor was allowed to provide a reply submission and the content of the intervenor's reply submission. As a result, the Ministry was allowed a sur-reply. The applicant objected to the late inclusion and content of an affidavit accompanying the Ministry's reply, so was allowed a sur-reply for the sole purpose of responding to that affidavit.

3. Was the manner in which the personal information was collected in compliance with s. 27 of FIPPA?

4. If the Ministry is found to have contravened s. 26 or s. 27 of FIPPA, what is the appropriate remedy?

[6] FIPPA is silent on the burden of proof in relation to ss. 26 and 27. In the absence of a formal or statutory burden of proof, it is incumbent upon each party to provide evidence and argument in support of their position.[3] The parties and the intervenor were advised of this in the Notice of Hearing.

[7] The Notice of Hearing sent to the parties states that the issues for this inquiry are whether the Ministry was authorized to collect the complainant's personal information under s. 26 of FIPPA and, if so, whether it collected the personal information in compliance with s. 27 of FIPPA. The complainant and intervenor submissions confirm that both understood these to be the issues for the inquiry.

[8] In its initial submission, however, the Ministry presents arguments about additional matters, namely the access, use and disclosure of the complainant's personal information. These were not matters about which the complainant complained, and the material before me does not indicate that they were at issue during the OIPC investigation. Subsequently, in its reply and sur-reply, the Ministry clarifies that it is not asking for the scope of the inquiry to be expanded to include these additional issues. Therefore, I will only address the issues contained in the Notice of Hearing, which I have enumerated above in paragraph [5].

DISCUSSION

[9] **Background**—This inquiry examines the parameters that FIPPA places on public bodies' collection of personal information, namely the purpose or authority for its collection (s. 26) and the method of its collection (s. 27). This case also highlights the challenges a public body may face when collecting personal information for the purpose of assessing a job applicant's past work performance. What is the public body to do if it believes that a job applicant's references are inadequate, for example, because they are not current, recent or direct work supervisors? Is the public body restricted to collecting past work performance information only from the references or sources provided by the job applicant? Does the public body need a job applicant's consent before gathering information about his or her past work performance?

[3] This approach is consistent with Order F07-10, 2007 CanLII 30395 (BC IPC). at para. 11 and Order F13-04, 2013 BCIPC No. 4, at paras. 5-7.

[10] The complainant in this inquiry worked for Emergency Management for several years, at the end of which time she left the provincial civil service. In 2010 she reapplied for work with Emergency Management and, as part of her application, she supplied the Ministry with the names of three references. Despite having previously performed a very similar (if not the identical) job for Emergency Management the complainant was not invited for an interview. When she inquired, she learned that rather than contacting the three references she had provided, the hiring manager spoke with three other individuals about her past work performance. The complainant also discovered that as a result of what these individuals said, she failed the past work performance check and was screened out of the competition.

Collecting personal information

[11] Section 26 of FIPPA places limits on the collection of personal information by or for a public body. The Ministry relies on ss. 26(a) and (c), (particulars to follow), which it says authorized the collection of the information in question.[4]

[12] Once the public body has established that it has the authority under s. 26 to collect personal information, s. 27 requires, with a few exceptions, that it be collected directly from the individual the information is about. The Ministry, acknowledging that it did not directly collect the complainant's personal information, relies on s. 27 1(a)(iii) and s. 27(1)(b) exceptions (particulars to follow).

Is the information in question "personal information"?

[13] The hiring manager's evidence is that she spoke with three individuals regarding their experiences and observations of the complainant's work performance, and she made notes of everything she was told about the complainant that was of use in her hiring decision.[5] This is the information at issue in this inquiry.

[14] The first step in this inquiry is to determine if that information is "personal information". Schedule 1 of FIPPA defines personal information as "recorded information about an identifiable individual other than contact information".[6]

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[4] Ministry's reply submission, para. 11.

[5] Hiring manager's initial affidavit. The Ministry did not provide a copy of the hiring manager's notes.

[6] "Contact information" is defined as "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." Contact information is not at issue here.

[15] The Ministry neither disputes nor concedes that the information in question is personal information, and it provides no submissions on that point.

[16] In my view, verbally communicated information about an identifiable individual is "personal information" as long as it exists or existed at one time in recorded format. Although there have been no BC orders that have addressed this particular point regarding verbal disclosure of previously unrecorded information about an identifiable individual, the approach I take is the one followed by Ontario's Information and Privacy Commissioner.[7] In this case, I find that the information about the complainant that the three individuals verbally provided to the hiring manager is the complainant's "personal information" for the purposes of FIPPA because the hiring manager recorded it in her notes.[8] To decide otherwise, would be inconsistent with the purposes of FIPPA and would allow the provisions that address personal information, in particular those in Part 3 of FIPPA, to be circumvented merely by claiming that the information was shared verbally.

Was there a "collection" of personal information?

[17] The Ministry states that when the hiring manager made written notes of the three individuals' opinions of the complainant, to the extent that those opinions were not already contained in records, she "collected" personal information.[9] However, the Ministry submits, some of what the hiring manager was told "would have been, in part, derived from recorded information" already in the Ministry's custody or control, such as performance evaluation records. It submits that when that previously recorded information was verbally conveyed between its employees, it was not a collection but rather an "internal accessing" of the information.[10] Despite this assertion, there is nothing in the affidavit evidence or the records themselves that suggests that what the hiring manager wrote in her notes was already recorded elsewhere in Ministry records.

[18] The Ministry references an Alberta order and an Ontario investigation report as support for its contention that what took place in this case was not a collection of personal information but rather what it calls an "internal accessing" of personal information.[11] I find these cases to be of little assistance because their facts differ significantly from those in this inquiry. In both cases, written records containing personal information were already in the custody or control of the public body, and when they were accessed or viewed by members of the

[7] See for example, Privacy Complaint No. MC-020008-1, 2003 CanLII 53695 (ON IPC) and Privacy Complaint No. PC-060004-1, 2006 CanLII 50784 (ON IPC).
[8] I recognize that the opinions of the three individuals reveal their thoughts and views, so it is also their personal information.
[9] Ministry's initial submission, para. 2.08.
[10] Ministry's initial submission, paras. 2.06-2.07.
[11] Order 2000-002, 2000 CanLII 28694 (AB OIPC); Vaughan (City) (Re), 2011 CanLII 47522 (ON IPC).

public body it was held to be an internal dissemination not a collection of personal information. In the case before me, however, the hiring manager made a new record (*i.e.,* notes) of what she was told and, importantly, she explains that she did not personally access any existing records in order to make her hiring decision.

[19] I find that when the hiring manager made written notes of what she was told about the complainant, she "collected" personal information for the purposes of FIPPA.

Purpose for which personal information was collected – Section 26

[20] Given that I have found that what took place when the hiring manager spoke with the three individuals was a collection of the complainant's personal information, the next question is whether the Ministry was authorized by FIPPA to collect that personal information. Section 26 recognizes the need for public bodies to collect personal information in order to carry out their mandates but restricts that collection to a defined set of circumstances. The Ministry submits that ss. 26(a) and (c) of FIPPA provide it with the authority to collect the personal information in question. Those sections read as follows:

> 26 A public body may collect personal information only if
>
> (a) the collection of the information is expressly authorized under an Act,
>
> ...
>
> (c) the information relates directly to and is necessary for a program or activity of the public body,

Expressly authorized, s. 26(a)

[21] The Commissioner has discussed s. 26(a) and what is required in order to establish that the collection of personal information is expressly authorized under an Act, at length, on four previous occasions.

[22] In Insurance Corp. of British Columbia,[12] the Commissioner's delegate examined the Insurance Corporation of British Columbia's ("ICBC") collection of weight information from drivers' licence applicants. He found that this collection of personal information, in order to put it on a licence document that can be used to identify the licence holder as someone who is authorized to drive a motor vehicle, was expressly authorized by s. 25(2.1) of the *Motor Vehicle Act*. Section 25(2.1) states, "For the purposes of making an application for a driver's licence under subsection (1), the Insurance Corporation of British Columbia may

[12] Insurance Corp. of British Columbia, [2000] B.C.I.P.C.D. No. 15.

require the applicant for a driver's licence and for a driver's certificate to provide information...".

[23] Investigation Report F11-03[13] dealt with BC Hydro's use of smart meters to collect hourly information about its customers' electricity consumption, information which the Commissioner determined was the personal information of BC Hydro's customers. The Commissioner concluded that s. 2(d) of the *Smart Meters and Smart Grid Regulation* of the *Clean Energy Act*, which provides that smart meters must be capable of recording measurements of electricity "at least as frequently as in 60-minute intervals", provides the express statutory authority under s. 26(a) of FIPPA for the collection of hourly electricity consumption data.

[24] In Investigation Report F12-01,[14] the Commissioner examined ICBC's collection of digital photographs and biometric data, (*i.e.,* measurements taken of an individual's facial geometry and skin texture), which she determined was personal information. The Commissioner concluded that s. 25(3) of the *Motor Vehicle Act* gives ICBC the express statutory authority to collect this personal information. Section 25(3) states, "For the purpose of determining an applicant's driving experience, driving skills, qualifications, fitness and ability to drive... the applicant must... (d) submit to having his or her picture taken".

[25] Conversely, in Order F07-10[15] the Commissioner found that the Mission School District's board of education did not have express statutory authorization to collect the personal information it was obliging prospective employees to provide by way of an on-line computer-based assessment tool.[16] The board submitted that s. 15(1) of the *School Act* provided the express statutory authority for such collection because it charged school boards with the responsibility for hiring staff. The Commissioner, however, found that there was no language in the *School Act* expressly authorizing or directing the collection of personal information for the hiring process. Section 15(1) of the *School Act* simply says that a "board may employ and is responsible for the management of those persons that the board considers necessary for the conduct of its operations". While it was implicit that personal information would have to be collected, the Commissioner found this did not meet the requirements of s. 26(a).[17]

[13] Investigation Report F11-03, 2011 BCIPC No. 43.
[14] Investigation Report F12-01, 2011 BCIPC No. 5.
[15] Order F07-10, 2007 CanLII 30395 (BC IPC).
[16] Order F07-10, 2007 CanLII 30395 (BC IPC).
[17] He also references Investigation Report P98-012, where it was stated (with no elaboration) that legislation that simply authorizes programs or activities – but only implies that personal information needs to be collected – is not sufficient to meet the test under s. 26(a).

[26] Turning back to the circumstances of the present inquiry, the Ministry submits that s. 8(2) of the *Public Service Act* provides it with the "express statutory authorization to collect past work performance information".[18] The relevant portions of the *Public Service Act* are as follows:

> *Appointments on merit*
>
> 8(1) Subject to section 10, appointments to and from within the public service must
>
> (a) be based on the principle of merit, and
>
> (b) be the result of a process designed to appraise the knowledge, skills and abilities of eligible applicants.
>
> (2) The matters to be considered in determining merit must, having regard to the nature of the duties to be performed, include the applicant's education, skills, knowledge, experience, past work performance and years of continuous service in the public service.

[27] The intervenor states that s. 8 of the *Public Service Act* only sets out general categories of information that must be considered in making appointments in a merit based public service. It does not specifically require any particular method of achieving this goal.[19] The complainant's submission on this point is that the collection is not authorized under s. 26.[20]

[28] Section 8 of the *Public Service Act* says nothing about the activity of collecting, recording or supplying of personal information. In that way it resembles the legislation addressed in Order F07-10. In my view, s. 8 of the *Public Service Act* does not expressly authorize the collection of personal information. Therefore, the Ministry's collection of the personal information in question is not authorized by s. 26(a) of FIPPA.

Relates directly to and is necessary for a program or activity, s. 26(c)

[29] The Ministry also relies on s. 26(c) of FIPPA for the collection of the complainant's personal information. That section authorizes a public body to collect personal information if the information "relates directly to and is necessary for a program or activity of the public body".

Directly related

[30] The first question to be decided is whether the Ministry is collecting personal information that is directly related to a program or activity.

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[18] Ministry's initial submission, para. 5.07.
[19] Intervenor's reply submission, para. 9.
[20] Complainant's reply submission, p. 7.

[31] The Ministry does not specifically identify a "program or activity". However, it does explain that the purpose for collecting the personal information in this case was to make a hiring decision.[21] The intervenor submits that the "collection of information from references provided by a job applicant may relate directly to the hiring activity of the public body."[22] The complainant makes no submission on this issue.

[32] I find that the collection of information about the complainant from her former supervisors is directly related to an activity of the Ministry, which in this case is the hiring of personnel. Hiring employees who are a good fit for a job is an essential component of the operations of any public body. It goes without saying that knowing how an individual has performed in a former workplace gives the prospective employer some idea of how the individual might perform in the future.

Necessary

[33] The second question to be answered in a s. 26(c) analysis is whether the personal information in question is necessary for the Ministry's hiring activity. I will take the same approach to assessing the element of "necessary" as was used in Order F07-10 where former Commissioner Loukidelis explained:

> It is certainly not enough that personal information would be nice to have or because it could perhaps be of use some time in the future. Nor is it enough that it would be merely convenient to have the information...
>
> At the same time, I am not prepared to accept... that in all cases personal information should be found to be "necessary" only where it would be impossible to operate a program or carry on an activity without the personal information. There may be cases where personal information is "necessary" even where it is not indispensable in this sense. The assessment of whether personal information is "necessary" will be conducted in a searching and rigorous way. In assessing whether personal information is "necessary", one considers the sensitivity of the personal information, the particular purpose for the collection and the amount of personal information collected, assessed in light of the purpose for collection. In addition, FIPPA's privacy protection objective is also relevant in assessing necessity, noting that this statutory objective is consistent with the internationally recognized principle of limited collection.[23]

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[21] Ministry's initial submission, paras. 4.07 and 5.17.
[22] Intervenor's initial submission, para. 24. It does not explain its use of the conditional "may".
[23] F07-10, 2007 CanLII 30395 (BC IPC), at paras. 48-49. This was also the approach in Order F07-18, 2007 CanLII 42407 (BC IPC); Order F13-04, 2013 BCIPC No. 4; Investigation Report F10-02, 2010 BCIPC 13; and Investigation Report F12-03, 2012 BCIPC No. 16. The Ministry relies on the approach taken in Order F07-10 (Ministry's initial submission, para 5.13).

[34] The statutory objectives in FIPPA referenced in this quote bear repeating here. They include making public bodies more accountable to the public, protecting personal privacy and preventing unauthorized collection, use or disclosure of personal information by public bodies.

[35] As stated in Order F07-10 quoted above, the sensitivity of the personal information should be considered when determining whether its collection is necessary within the meaning of s. 26(c). The Ministry submits that the personal information the hiring manager collected is not "sensitive in this context" or "sensitive, assessed in light of the purpose for collection.[24] The intervenor argues that the information is highly sensitive information about the complainant's work history and personal characteristics.[25] The complainant makes no submission regarding the sensitivity of the information gathered.

[36] The complainant provides a copy of the questions the hiring manager asked the individuals with whom she spoke, as well as the notes recording their responses.[26] There were seven questions asked, and the hiring manager took three pages of handwritten notes for each of the three individuals.

[37] I have reviewed these questions and notes in order to understand the nature of the personal information the hiring manager obtained, and I find that it is sensitive personal information. The notes record opinions about the complainant's interpersonal skills, her ability to handle stressful situations, follow directions, complete tasks, work alone and work with others. It also includes information about whether there were labour relations issues related to the complainant and whether the interviewee would rehire her. FIPPA already recognizes that this type of information is sensitive from an access to information point of view and disclosure of it is presumed to be an unreasonable invasion of personal privacy because it consists of employment history (s. 22(3)(d)) and personal recommendations or evaluations, character references or personnel evaluations (s. 22(3)(g)).

[38] The purpose for collection should also be considered when determining whether collection is necessary within the meaning of s. 26(c). The Ministry submits that the purpose for the collection of the personal information in question was to enable it to make a hiring decision.[27] The Ministry supplies affidavit evidence from the Director of the Hiring Centre for the BC Government's Public Service Agency, which includes a copy of the policy respecting appointments to the public service at the time of the events in question. The policy states:

[24] Ministry's initial submission, para. 5.18.
[25] Intervenor's reply submission, para. 25.
[26] The complainant explains that she made a previous FIPPA request for these records.
[27] Ministry's initial submission, para. 5.17.

> Past work performance is one of the best predictors of future performance and must be assessed for all qualified applicants. The past work performance assessment may be conducted at any time in the selection process. Methods of assessing work performance may vary depending on the situation, but will include an employment reference (one of which must be from a supervisor or equivalent) and may also include looking at performance reviews, and reviewing work samples.[28]

[39] The Director also explains that the requirement for an employment reference is to ensure that significant indicia for employment are assessed, such as regular attendance, responsiveness to direction, attaining performance levels, the exercise of judgment, the ability to work with others, and the ability to conduct matters in a professional manner. She adds that hiring managers are advised that the best practice is to obtain an employment reference from the current or immediately previous supervisor, unless that supervisor did not work long with the employee. Hiring managers are also informed that the best practice is not to rely on references from "long-ago supervisors" or from friends, family or colleagues who did not have responsibility for managing the job applicant's work performance.

[40] The Ministry also provides affidavit evidence from the hiring manager who conducted the past work performance check on the complainant. Her evidence is that the complainant provided the names of three references: two the hiring manager believed were never the complainant's direct supervisors, and the third she did not think he had supervised the complainant for the period the complainant claimed. She did not contact the references provided by the complainant. Instead, she chose to contact three other individuals who she believed had recently supervised the complainant: the complainant's supervisor in her most recent job and her manager and director immediately prior to that. Two of these individuals were employees of the Ministry and the third had been but had moved on to work for the BC Government's Public Service Agency. All three told her about their experiences and observations while supervising the complainant in the positions she previously held in the Ministry. The hiring manager made notes of what they told her.

[41] The hiring manager explains that she believed she was required by the *Public Service Act* and best practices to contact the people she considered the best sources of information. She thought that the three individuals she spoke to were the best source of relevant and recent past work performance information and that obtaining information from the complainant's chosen references would not have been a reasonable or viable alternative.

[28] Exhibit A of the Director's May 1, 2013 affidavit.

[42] The intervenor submits that the collection of the personal information in question was not authorized under s. 26(1)(c) because it was not necessary for a program or activity of the public body. It submits that if the purpose for collecting information from references is to examine the suitability of an applicant for employment, then collecting information from references other than those the complainant provided went beyond what could reasonably be considered necessary for that purpose. It points out that there is no evidence that the complainant's preferred references were unavailable or that the Ministry was unable to obtain other references from the complainant.

[43] The complainant explains that she worked for Emergency Management for approximately nine years, and she left the provincial civil service because her position was declared redundant. In April 2010 she submitted an application for the same position she held in her first three years working with Emergency Management. As part of her application, she supplied as references the names of three individuals who supervised and managed her work when she used to be employed with Emergency Management (including in the job for which she was applying). She spoke with her chosen references and authorized them to provide information about her.

[44] The complainant explains that the Ministry did not contact her chosen references or request that she provide different or further references. Instead, the hiring manager spoke to people the complainant would not have chosen as references because they barely knew her or her past performance and accomplishments. The complainant submits that it was not necessary for the operating program or activities of the Ministry to obtain information from individuals she did not provide as references.

[45] I am not satisfied that, in the circumstances of this case, it was necessary for the Ministry to obtain information about the complainant in the manner it did in order to carry out its hiring process. Contrary to the Ministry's submission, s. 8 of the *Public Service Act* and the related human resources policy do not require that the past work performance information include the opinion of the job applicant's most recent supervisors. Further, the most recent or current supervisor is not by definition the best source of information as he or she may not have spent as much time supervising the applicant as a previous, longer-serving supervisor. In addition, there may be situations where, through no fault of her own, an applicant cannot use her current or most recent supervisor as a reference (*e.g.,* personality conflict or harassment of employee), and a potential employer would not know that without seeking context from the job applicant directly.

[46] Although the facts of Order F07-18 differ somewhat to those here, I think that the principled approach Adjudicator Boies-Parker applied when considering whether the necessity test was met is helpful. She found that the University of British Columbia's surreptitious monitoring and recording of an employee's

internet usage was not a necessary collection of personal information. She concluded that the University had taken no other steps to address the employee's offending behaviour before initiating surreptitious surveillance. She wrote,

> ... in the context of FIPPA, I find that the employer is not required to exhaust all possible other means of managing the relationship, without regard to whether those alternative means are reasonable or likely to succeed. However, if there are reasonable and viable alternatives to the surreptitious collection of personal information, that is a matter to be considered in determining whether the collection was necessary for the purposes of s. 26(c).[29]

[47] Similarly, in this case I agree that the assessment of whether the information in question was necessary requires consideration of what other options may have been available to the Ministry besides collecting the complainant's personal information without her knowledge or consent.

[48] There is nothing in the inquiry materials in this case to indicate why the Ministry did not simply ask the complainant to provide other references that would be more current and relevant to the Ministry's needs. Another option would have been to seek the complainant's agreement to collect information from the three particular individuals to whom the hiring manager wanted to speak. Either of these options would have been more consistent with the purposes of FIPPA in the sense of giving the complainant control over access to her personal information as well as the chance to explain her original decision not to select these three as references. If the end result of such a consent-based approach was that the Ministry was unable to collect what it considered to be sufficiently recent or relevant information, the assessment of the complainant's past work performance and the resulting hiring decision would reflect that accordingly. In this regard, it is important to remember that the Ministry was not compelled to hire the complainant in the absence of what it believed was incomplete or otherwise unsatisfactory past work performance information.

[49] I note that this approach does not deny a public body the right to access and consider information that it previously collected about an individual, for example past performance records contained in a personnel file. Such information is generally collected in a manner that is transparent and open to the person it is about. When an employer accesses such records in the context of a job applicant seeking reemployment, the employer is using the personal information for the use for which it was originally obtained or compiled, namely to manage an employment relationship with the individual. Of course, that is not the fact pattern in this case because the hiring manager's evidence is

[29] Order F07-18, 2007 CanLII 42407 (BC IPC), at para. 72.

that she did not access or consider existing records, and the personal information she collected consisted of verbally-provided opinions.

[50] In conclusion, while the collection of the personal information in question was directly related to the Ministry activity of hiring staff, I am not persuaded that it was "necessary" for that activity as that term has been interpreted in past orders. Therefore the collection was not authorized under s. 26(c) of FIPPA.

Section 26 summary

[51] The Ministry submitted that the collection of the personal information in question was authorized by s. 26(a) and (c) of FIPPA. I find that the collection was not permitted by s. 26(a) because it was not expressly authorized under an Act (*i.e.,* the *Public Service Act*). I also find that the collection was not authorized under s. 26(c) because the information was not necessary for a Ministry program or activity.

How the personal information was collected – Section 27

[52] Section 27(1) of FIPPA states that if a public body is authorized to collect personal information it must collect it directly from the individual the information is about unless the individual authorizes the indirect collection or one or more of several listed exceptions apply. The Ministry acknowledges that it did not collect the complainant's personal information from her directly, and it relies on the following two exceptions for the indirect collection: [30]

> *How personal information is to be collected*
>
> 27(1) A public body must collect personal information directly from the individual the information is about unless
>
> (a) another method of collection is authorized by
>
> ...
>
> (iii) another enactment,
>
> ...
>
> (b) the information may be disclosed to the public body under sections 33 to 36,

[53] In light of my finding that the Ministry was not authorized under s. 26(a) or (c) to collect the personal information it did, it is not strictly necessary to address whether the method of collection conformed to the requirements of s. 27. However, given that the parties have made submissions regarding s. 27, I will consider the way in which the personal information was collected.

[30] Ministry's reply submission, paras. 11 and 15.

Authorized by another enactment, s. 27(1)(a)(iii)

[54] The Ministry submits that s. 8 of the *Public Service Act* provides statutory authority for the indirect collection of past work performance information. It explains, "it is enough that the indirect collection be necessarily contemplated by the relevant enactment."[31]

[55] In my view, the requirement to assess past work performance articulated in s. 8 of the *Public Service Act* does not authorize collection of personal information by either direct or indirect means. While s. 8 may imply that a collection of personal information is needed in order to assess past work performance, it says nothing explicitly about collection, let alone whether collection should be "direct" or "indirect". Therefore, I find that s. 27(1)(a)(iii) did not provide the Ministry with the authority to indirectly collect the complainant's personal information.

Disclosure permitted under ss. 33-36 of FIPPA, s. 27(1)(b)

[56] The Ministry also submits that the indirect collection of the complainant's personal information was authorized because the information may be disclosed to the Ministry under ss. 33.1(1)(c) and (e) and ss. 33.2 (a), (c) and (d).[32] I will deal with each of these subsections in turn.

Section 33.1(1)(c)

[57] Section 33.1(1)(c) states that a public body may disclose personal information in its custody or under its control "in accordance with an enactment of British Columbia, other than this Act, or Canada that authorizes or requires its disclosure".

[58] The Ministry submits that the authorization or requirement for the disclosure in this case comes from s. 8 of the *Public Service Act* because, "it is sufficient that the disclosure be necessarily contemplated by the relevant enactments".[33] I disagree. As I have discussed above, there is nothing in s. 8 of the *Public Service Act* that, either directly or by implication, addresses disclosure of personal information.

Sections 33.1(1)(e) and 33.2(c)

[59] Sections 33.1(1)(e) and 33.2(c) state that a public body may disclose personal information in its custody or under its control to a minister, officer or

[31] Ministry's initial submission, paras. 5.24 and 5.26.
[32] Section 33.1 applies to disclosure both inside or outside of Canada and s. 33.2 applies only to the disclosure of information within Canada.
[33] Ministry's initial submission, para. 5.43.

employee of the public body if the information is necessary for the performance of that minister, officer or employee's duties.[34] The Ministry's submission on this point is that the information was necessary "for the performance of the duties of the hiring manager (*i.e.,* she was required to conduct reference checks in accordance with the *Public Service Act* and related polices and best practices)".[35]

[60] For the same reasons that I found that the collection of the personal information in question was not necessary for the Ministry's hiring activity, I find that the disclosure of the personal information was not necessary for the performance of the hiring manager's duties. Section 8 of the *Public Service Act* and the human resources policy included in the inquiry materials required certain actions on the part of the hiring manager in order to fulfil her duties when it comes to checking past work performance. Specifically, the human resources policy states that an employment reference must be obtained from a supervisor or equivalent. It does not require that references come from an applicant's current or most recent supervisor. Furthermore, there is nothing in the inquiry materials that indicates why it might be necessary for the hiring manager to obtain past work performance information without the complainant's knowledge or consent. Therefore, I find that the disclosure of the information in question was not necessary for the performance of the hiring manager's duties and it was not authorized by ss. 33.1(1)(e) and 33.2(c).

[61] Both ss. 33.1(1)(e) and 33.2(c) regulate the disclosure of information within a single public body.[36] Some of the information in question in this case came from an individual who no longer worked for the Ministry when he spoke with the hiring manager. The Ministry submits that the disclosure by this individual should be regarded as having occurred within the Ministry because the information disclosed was based on the individual's previous supervisory role within the Ministry.[37] I disagree that the disclosure by an individual who no longer works for a public body amounts to a disclosure by "a public body" to "an employee of the public body", as is required by ss. 33.1(1)(e) or 33.2(c). The Ministry is the public body and the individual did not work for the Ministry at the time of disclosure, so the disclosure was not authorized by ss. 33.1(1)(e) or 33.2(c). However, nothing ultimately hinges on this finding, given my decision that the information disclosed was not necessary for the performance of the hiring manager's duties.

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[34] Section 33.1(1)(e) applies to disclosure inside or outside Canada. Section 33.2(c) applies to disclosure inside Canada.
[35] Ministry's initial submission, para. 5.35.
[36] In Investigation Report F10-02, ss. 33.1(1)(e) and 33.2(c) did not authorize a regional health board's disclosure of personal information to *other* public bodies.
[37] Ministry's initial submission, paras. 5.32-34.

Section 33.2(a)

[62] Section s. 33.2(a) states that a public body may disclose personal information in its custody or under its control for the purpose for which it was obtained or compiled or for a use consistent with that purpose.

[63] The Ministry asserts that what the hiring manager was told "would have been, in part, derived from recorded information in the custody or control of the Public Body (for example, from performance evaluation records)".[38] The Ministry's wording implies that what the three individuals told the hiring manager was, in part, a recital or verbatim disclosure of previously "obtained" or "compiled" (*i.e.,* recorded) personal information. However, there is no evidence to substantiate that this is what actually occurred. I have reviewed the hiring manager's notes of her conversations as well as her affidavit evidence of what she says took place. My conclusion is that the information the three individuals verbally provided to the hiring manager consisted of their previously unrecorded opinions and observations – not previously obtained or compiled personal information.

[64] In conclusion, I find that the Ministry has not established that what transpired in this case was a disclosure of "obtained" or "compiled" personal information, so s. 33.2(a) does not apply.

Section 33.2(d)

[65] The Ministry submits that if I conclude that the disclosure by the individual who was not working for the Ministry is disclosure from one public body to another, then that disclosure was authorized by s. 33.2(d) because hiring for the public service is a common and/or integrated program and/or activity of the Public Service Agency and individual ministries.[39] The Ministry does not elaborate further other than to point out that at the time of the events (*i.e.,* 2010) there was no definition of "common or integrated program or activity" in FIPPA.

[66] At the time of the events in question, s. 33.2(d) read as follows:

> 33.2 A public body may disclose personal information referred to in section 33 inside Canada as follows:
>
> (d) to an officer or employee of a public body or to a minister, if the information is necessary for the delivery of a common or integrated program or activity and for the performance of the duties of the officer, employee or minister to whom the information is disclosed;

[38] Ministry's initial submission, para. 2.07.
[39] Ministry's initial submission, para. 5.41.

[67] The current version of s. 33.2(d) differs only slightly in that it now also applies to an officer or employee of an "agency" and the duties of the officer, employee or minister must be the duties "respecting the common or integrated program or activity". However, more significantly, Schedule 1 of FIPPA was amended in November 2011 to include the following definition:

> "common or integrated program or activity" means a program or activity that
>
> (a) provides one or more services through
>
> (i) a public body and one or more other public bodies or agencies working collaboratively, or
>
> (ii) one public body working on behalf of one or more other public bodies or agencies, and
>
> (b) is confirmed by regulation as being a common or integrated program or activity;

[68] Despite the fact that there was no definition of "common or integrated program or activity" at the time of the events in question, the Acting Commissioner had only a few months earlier provided his interpretation of the phrase in Investigation Report F10-02.[40] He noted that in order for a disclosure to be considered necessary for the delivery of a common or integrated program or activity (and to satisfy the requirements of s. 33.2(d) of FIPPA), the program or activity must be formally established or recorded in documentation and have a structure that demonstrates that there is an integrated program with another public body. He explained that the public body needs to provide evidence of the common or integrated program or activity, including its structure and mandate and documentation establishing it, the membership and budget. He added that merely collecting similar information for similar purposes does not render activities "common or integrated". I find that this understanding of the term "common or integrated program or activity" is consistent with the current definition, and I have applied it to the facts of this inquiry.

[69] The Ministry provides no information that establishes the formal existence of a common or integrated program or activity between the Public Service Agency and itself. For example, there is no detail or documentation that reveals the objectives or purposes of the common or integrated program or activity, how it is structured, when it was established and who is participating. Therefore, I am not persuaded that the disclosure of the complainant's personal information by the individual who no longer works for the Ministry relates in any way to a common or integrated program or activity, within the meaning of s. 33.2(d).

[40] Investigation Report F10-02, 2010 BCIPC 13, at paras. 67 and 98.

[70] In summary, there is simply insufficient information for me to conclude that s. 33.2(d) authorized the disclosure by the individual who was no longer an employee of the Ministry.

Section 27 summary

[71] The Ministry submitted that the indirect collection of the complainant's personal information was authorized by both s. 27(1)(a)(iii) and 27(1)(b). I found that s. 27(1)(a)(iii) did not permit indirect collection because another enactment did not authorize indirect collection. I also found that s. 27(1)(b) did not permit indirect collection because disclosure of the personal information was not authorized under ss. 33.1(1)(c) and (e) or ss. 33.2(a), (c) and (d).

[72] Finally, I note that s. 27(1)(f) permits indirect collection of personal information if it is necessary for the purposes of "managing or terminating" an employment relationship between a public body and the employee. I conclude that if the Legislature had intended to permit indirect collection of personal information during recruitment, it would have included language to that effect in s. 27(1)(f).

CONCLUSION

[73] What this case illustrates is that public bodies must not lose sight of their obligation to deal with personal information in an open and accountable manner. In the circumstances of reference-checking, that means collecting past work performance information with the knowledge and agreement of the individual it is about. It is only fair in the power dynamic of a job competition that an applicant be allowed to clarify or amend their choice of references if the public body deems them inadequate for a proper assessment of past work performance.

[74] In conclusion, when a public body wishes to collect past work performance information from a source not provided by an applicant, the applicant should be informed and allowed to agree or disagree to that collection. Such an approach allows the public body to collect personal information in an open and accountable manner and in no way deprives it of its ability to assess past work performance or make hiring decisions.

ORDER

[75] For the reasons provided above, I find that the Ministry's collection of the complainant's personal information was not authorized by s. 26 of FIPPA. I also find that the manner in which the personal information was collected was contrary to s. 27 of FIPPA.

[76] Further, under s. 58(3)(f) of FIPPA I require the Ministry to destroy the personal information collected in contravention of FIPPA that is contained in the hiring manager's notes.

July 28, 2014

ORIGINAL SIGNED BY

Elizabeth Barker, Adjudicator

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