



OFFICE OF THE
INFORMATION & PRIVACY
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Order F14-41

MINISTRY OF FINANCE (BC PUBLIC SERVICE AGENCY)

Hamish Flanagan, Adjudicator

September 24, 2014

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Summary: The applicant requested records about a named employee of the BC public service. The request was responded to by the BC Public Service Agency, part of the Ministry of Finance, which withheld the responsive records from the employee's personnel file on the basis disclosure was an unreasonable invasion of privacy under s. 22 of FIPPA. The adjudicator ordered disclosure of the information about the named employee's position, functions and remuneration because it would not be an unreasonable invasion of the employee's privacy under s. 22(4)(e) of FIPPA. The adjudicator determined that the Ministry must continue to withhold the remaining information because there is a presumption that disclosure of the information would be an unreasonable invasion of the named employee's privacy under s. 22(3) and the presumption was not rebutted by any factors, including those in s. 22(2) of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22, 22(4)(e), 22(3) and (22)(2).

Authorities Considered: **B.C.:** Order F13-09, 2013 BCIPC 10 (CanLII); Order F12-08, 2012 BCIPC 12 (CanLII); Order F10-05, 2010 BCIPC 8 (CanLII); Order F10-32, 2010 BCIPC 45 (CanLII); Order F09-15, 2009 CanLII 58553 (BC IPC); Order F12-12, 2012 BCIPC 17 (CanLII); Order F10-21, 2010 BCIPC 32 (CanLII); Order F08-04, 2008 CanLII 13322 (BC IPC); Order 01-53, 2001 CanLII 21607 (BC IPC); Order F11-04, 2011 BCIPC 4 (CanLII); Order F14-18, 2014 BCIPC 21 (CanLII); Order F09-24; 2009 CanLII 66961 (BC IPC); Order No. 54-1995, 1995 CanLII 1713 (BC IPC); Order No. 128-1996, 1996 CanLII 1324 (BC IPC); Order 00-48, 2000 CanLII 14413 (BC IPC); Order 01-18, 2001 CanLII 21572 (BC IPC); Order 02-23, 2002 CanLII 42448 (BC IPC).; Order 00-53, 2000 CanLII 14418 (BC IPC); Order 02-56, 2002 CanLII 42493 (BC IPC); Adjudication Order No. 2, 1994 CanLII 1208 (BC IPC). **ON:** Order MO-2521, 2010 CanLII 29393 (ON IPC).

Cases Considered: *Architectural Institute of British Columbia v. British Columbia (Information and Privacy Commissioner)* 2004 BCSC 217.

INTRODUCTION

[1] This inquiry involves a request for records about a named employee of the British Columbia public service. The applicant requested “any disciplinary records, resumes or curriculum vitae, and information about all the positions held by the employee with the Province, including the duration of each position and the reason for no longer holding each position.”

[2] The BC Public Service Agency, a part of the Ministry of Finance (“Ministry”) responded to the request and denied access to all of the responsive records on the basis that disclosure would be an unreasonable invasion of the privacy of the named employee within the meaning of s. 22 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[3] The applicant requested a review of the Ministry’s response by the Office of the Information and Privacy Commissioner (“OIPC”). OIPC mediation resolved some issues raised by the applicant but not whether the records should be withheld under s. 22 of FIPPA, and this matter proceeded to inquiry under Part 5 of FIPPA.

ISSUE

[4] The issue in dispute is whether the Ministry is required to refuse access to information because disclosure would be an unreasonable invasion of third party personal privacy under s. 22 of FIPPA.

[5] The applicant has the burden of proof in this inquiry pursuant to s. 57(2) of FIPPA.

DISCUSSION

[6] **Records in issue**—The records comprise information in the third party employee’s personnel file, including:

- 1) multiple iterations of the employee’s resume at different points in time;
- 2) letters offering or confirming the employee’s employment in various positions over the course of his employment in the BC public service; and
- 3) other personnel records, including documents relating to a proposed secondment and a personalized employee work plan.

Preliminary issues

[7] **Mediation materials**—Portions of the applicant's submissions reveal "without prejudice" communications. Specifically, the applicant's initial submissions reveal communication that took place with an OIPC mediator on a "without prejudice" basis in order to resolve this dispute, and which therefore could not be used by the parties in any subsequent proceeding. I have not considered these without prejudice communications in this inquiry, as they are not properly before me. The citation of this information in the applicant's submission arises from a misapprehension that the OIPC is a party to this inquiry. The OIPC is impartial and independent of the parties.

[8] **Role of previous decisions**—The applicant's submissions caution against slavishly following previous decisions¹ in deciding this inquiry, and stresses the need to consider the matters raised in this inquiry on their particular facts. I note that the OIPC is not bound by its previous orders and that the specific facts at issue are closely examined in every inquiry. Nonetheless, previous orders usefully illuminate sound legal principles and assist in achieving coherent, consistent and predictable results, which is fundamental to the administration of justice generally, and specifically in this case for the application of FIPPA. Accordingly, this inquiry does draw on the reasoning and approach in previous relevant decisions.

[9] **Unreasonable invasion of a third party's privacy — s. 22**—The relevant portions of s. 22 of FIPPA for this inquiry state:

- 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.
- (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
 - (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,
 - ...
 - (f) the personal information has been supplied in confidence,

¹ The doctrine of stare decisis.

- ...
- (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,
- ...
- (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,

[10] **Approach to s. 22**—Section 22 is a mandatory exception requiring the Ministry to refuse to disclose personal information to the applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. Section 22 can be considered by answering the following questions:²

- 1) Is the information personal information?
- 2) If it is personal information, does it meet any of the criteria identified in s. 22(4)? If so, disclosure would not be an unreasonable invasion of third party personal privacy.
- 3) If none of the s. 22(4) criteria apply, do any of the presumptions in s. 22(3) apply? If so, disclosure is presumed to be an unreasonable invasion of third party privacy.
- 4) If any s. 22(3) presumptions apply, are they rebutted after considering all relevant circumstances including those listed in s. 22(2)?
- 5) If no s. 22(3) presumptions apply, after considering all relevant circumstances including those listed in s. 22(2), would disclosure be an unreasonable invasion of a third party's personal privacy?

² Order F13-09, 2013 BCIPC 10 (CanLII); Order F12-08, 2012 BCIPC 12 (CanLII) et al.

[11] **Personal Information**— For s. 22 to apply, the information at issue must be the personal information of a third party. FIPPA defines personal information as "recorded information about an identifiable individual other than contact information."³ 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."⁴

[12] The applicant submits that the resumes are not personal information because they are "work product information". This argument is based on the definition of personal information under the *Personal Information Protection Act* ("PIPA"), which excludes work product information from its definition of personal information. However, FIPPA – not PIPA – is the applicable legislation for this inquiry and information about an identifiable individual that relates to the individual's work product is still personal information under FIPPA.

[13] The applicant argues that the definition of personal information for the purposes of s. 22, if not interpreted restrictively, effectively shifts the burden in access to information requests to the applicant, which defeats the purpose of FIPPA. As noted above, FIPPA places the burden of proof on the applicant to establish that disclosure of personal information is not an unreasonable invasion of third party personal privacy. I do not accept that there is a basis for giving the definition of personal information anything other than its plain and ordinary meaning. FIPPA's definition of personal information for the purposes of the exception to disclosure under s. 22 is one way FIPPA strikes the balance between the dual purposes set out in s. 2 of the Act, namely to make public bodies more accountable to the public and to protect personal privacy. Section 22 then provides a framework that considers a wide range of factors in deciding whether it would be an unreasonable invasion of a third party's privacy to disclose personal information. I see no reason or legitimate basis for diverging from the framework set out in FIPPA.

[14] Almost all of the withheld information is the personal information of the third party employee. The personal information includes letters containing offers of and confirmation of employment, resumes and workplace evaluations, as well as personnel file numbers and the home contact details of the third party employee. The only information that is not personal information and therefore cannot be withheld under s. 22 is a small amount of contact information. This includes the employee's work telephone number that is in some iterations of his resume and the employee's work address in some of his job appointment letters.

³ Schedule 1 of FIPPA.

⁴ Schedule 1 of FIPPA.

[15] **Section 22(4) Factors**—Section 22(4) sets out circumstances when disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. Section 22(4)(e), which states that disclosure of personal information about a public body employee's position, functions or remuneration is not an unreasonable invasion of that third party's privacy, is relevant in this inquiry.

[16] **Section 22(4)(e) and the records in issue: Information about an employee's past position, functions or remuneration at multiple points in time**—The records in issue include information about the third party employee's position, functions or remuneration in previous jobs he has held within the BC public service. The issue here is whether this type of information which reveals the employees position, functions or remuneration at multiple points in the past falls within the scope of s. 22(4)(e).

[17] The applicant submits that s. 22(4)(e) applies to both past and current job titles and job descriptions. He suggests there is no explicit use of the present tense in s. 22(4)(e) and that ss. 22(4)(f), (h) and (j) all encompass present and past information, so s. 22(4)(e) should also.

[18] The Ministry submits that s. 22(4)(e) only applies to current job descriptions, and that past job descriptions like those at issue here fall within s. 22(3)(d).

[19] Under s. 22(4)(e), disclosing personal information about a third party's position, functions and remuneration as an employee of a public body is not an unreasonable invasion of the third party's privacy. However, disclosing a third party's employment occupational or educational history is a presumed invasion of the third party's privacy under s. 22(3)(d). As Order F08-04⁵ notes in relation to ss. 22(4)(e) and 22(3)(d) "these different categories of information relate to the competing principles which animate FIPPA, namely, the objectives of ensuring transparency of public bodies and appropriately protecting the privacy of individuals, including those employed by public bodies."

[20] While the parties submissions are on whether s. 22(4)(e) applies to past job descriptions, the ultimate question goes beyond that. The question that is squarely at issue in this case is whether s. 22(4)(e) could apply to information that reveals the employee's position, functions or remuneration at multiple points in the past, and second, whether s. 22(3)(d) could also apply to information that reveals the employee's position, functions or remuneration at multiple points in the past. Finally the question if both could apply is how to reconcile them and deal with the information in issue. In addressing those issues I will also be addressing the more general question raised in the parties submissions about

⁵ at para 21.

whether s. 22(4)(e) and/or s. 22(3)(d) applies to employees past positions, functions and remuneration.

[21] **Section 22(4)(e)**—I am satisfied that releasing the named individuals' previous positions, functions or remuneration at multiple points in the past falls within s. 22(4)(e).

[22] Order 02-56⁶ considered the application of s. 22(4)(e) to records comprising employees' contracts or agreements, including salaries and terms of reference or job descriptions that revealed employees position, functions or remuneration at more than one point in time. Adjudicator Francis considered the scope of s. 22(3)(d) and s. 22(4)(e) and stated that the plain meaning of s. 22(4)(e) includes any information in the records at issue that was about employees' job duties or functions, remuneration (including salary and benefits) or positions.⁷ The employment agreements and other documents that were released disclosed employees' remuneration at multiple points in time.

[23] Ontario Order MO-2521⁸ dealt with a request for certain benefits paid to a City employee for each year over a period of five years.⁹ The Ontario equivalent to s. 22(4)(a) was found to apply to the benefits paid for the time period requested and the records were required to be released.¹⁰

[24] Order F09-15¹¹ dealt with a request for severance and salary records for each year of a four year period. The order did not directly address the issue of releasing salary history information for a period of time under s. 22(4)(e) because the public body had not been subject to FIPPA for the entire four year period in issue. Nonetheless, in setting out the elements required for s. 22(4)(e) Adjudicator McEvoy did not distinguish between information about an employee's past position, functions or remuneration at multiple points in time or a single point in time.¹²

The meaning of s. 22(4)(e) must be derived from reading it in its entire context and grammatical and ordinary sense, harmoniously with the scheme and object of FIPPA, as well [as] the intention of the Legislature.

In general terms, s. 22(4)(e) is meant to ensure that information concerning public servants' remuneration, functions or positions is available and that personal privacy considerations do not impede

⁶ Upheld on judicial review in *Architectural Institute of British Columbia v. British Columbia (Information and Privacy Commissioner)* 2004 BCSC 217.

⁷ At para 63.

⁸ Order MO-2521, 2010 CanLII 29393 (ON IPC).

⁹ Paragraph 1.

¹⁰ Paragraph 38.

¹¹ Order F09-15, 2009 CanLII 58553.

¹² At para 15-16.

disclosure of this information. The provision applies when its two specific elements are satisfied. First, the requested information must be about a third party's remuneration [functions or positions]...

Second, the information must be about the third party's [position, functions or] remuneration "as an employee of a public body", which means that the individual receiving the remuneration is or was in the employ of a public body. I include the past tense of the phrase, "in the employ", because nothing in the language or context of s. 22(4)(e), including FIPPA's legislative objectives as expressed in s. 2(1), warrants interpreting s. 22(4)(e) to apply only if an individual, whose personal information is sought, is still employed by a public body at the time of the access request.

[25] I note also that information about a third party's position, functions and remuneration with a public body at multiple points in time is already publicly available for many public sector employees. One reason is the obligation under the *Financial Information Regulation*¹³ on certain public bodies of an annual reporting in a schedule of remuneration and expenses, payments made to or on behalf of each employee (as described in Order F10-05¹⁴). Equivalent disclosure to the *Financial Information Regulation* occurs in the Consolidated Revenue Fund Detailed Schedules of Payments of the Province's Public Accounts, in which the names, positions and remuneration for those public body employees paid more than \$75,000 are published annually.¹⁵ Previous orders have found the requirements of the *Financial Information Regulation* reporting regime to be narrower in scope than the information available under s. 22(4)(e) of FIPPA in certain respects,¹⁶ and not to limit the information available under FIPPA. Nonetheless, it illustrates that this public reporting makes it easy to compile a history of an individual employee's position and remuneration by accessing Public Accounts disclosures or public records created under the *Financial Information Regulation* over multiple years.¹⁷

[26] In summary, I find that s. 22(4)(e) can apply to the withheld information that discloses the employees past position, functions and remuneration at multiple points in time.

¹³ As required by s. 6 of Schedule 1 of the Regulation, a regulation of the *Financial Information Act*.

¹⁴ Order F10-05, 2010 BCIPC 8 (CanLII) at paras 23-25.

¹⁵ The *Vancouver Sun* has created an online searchable database of public sector remuneration information which allows searching of multiple years of remuneration information.

¹⁶ Order F10-05.

¹⁷ Indeed some media outlets compare this information over years to view and report on remuneration trends.

[27] **Section 22(3)(d)**—I have already determined based on the orders discussed above¹⁸ that s. 22(4)(e) can encompass information about an individual's former position, functions or remuneration in a public body, for example because they have been terminated, retired or are now employed in the private sector. I will now address the orders the Ministry cites in support of its proposition that s. 22(3)(d) and not s. 22(4)(e) applies to information about the employees past positions, functions and remuneration.

[28] The Ministry cites Order 54-1995¹⁹ in support of its position that information about the named employee's previous job positions falls under s. 22(3)(d) and not s. 22(4)(e). However, I do not agree that this Order stands for the proposition the Ministry posits. That Order involved a request for a named employee's educational background, employment background and qualifications for his present position, and any management reviews and/or disciplinary actions on the employee's file. Prior to the inquiry in that case, the public body released the job titles, job descriptions and required qualifications for the third party's current and previous positions. In summary, Order 54-1995 does not stand for the proposition that information about previous positions held by a public sector employee fall within s. 22(3)(d). Rather, it indicates that s. 22(4)(e) may apply to such information regarding past employment.

[29] The Ministry also cites Adjudication No. 2 in support of its view that s. 22(3)(d) not s. 22(4)(e) applies to previous job description information. I note however that the paragraph in Adjudication No.2 subsequent to those the Ministry quotes goes on to specially say that the question of the scope of s. 22(4)(e) in relation to historic rather than current information is not being decided in that decision.

[30] Further, in my view, the Ministry's submission that current but not past positions, functions and remuneration information are covered by s. 22(4)(e) risks creating an unprincipled distinction in regards to information. This is because whether information about a public body employee's former position, function and remuneration fell within s. 22(4)(e) or not could be determined by whether an individual had a different position, function or remuneration in a public body at the time of the request. Therefore, to the extent that the Ministry's submission is simply that s. 22(4)(e) does not apply to historic information about an employee's position, functions or remuneration, I disagree with the submission.

¹⁸ Order 02-56, 2002 CanLII 42493 (BC IPC); Order F10-32, 2010 BCIPC 45 (CanLII) and Order F09-15, 2009 CanLII 58553 (BC IPC). See also Order 00-53, 2000 CanLII 14418 (BC IPC) where a record that described the former duties, salary and other information of an individual who was no longer an employee was ordered released under s. 22(4)(e).

¹⁹ Order 54-1995, 1995 CanLII 1713 (BC IPC).

[31] While recognizing that s. 22(3) and s. 22(2) do not need to be considered if information falls within s. 22(4), it can still be helpful to consider the scope of s. 22(4)(e) in light of s. 22(3)(d) as other previous orders have done.²⁰

[32] I recognize that collating a third party's position, functions and remuneration over a period of time results in the applicant receiving a simplified form of work or employment history for that third party employee, which falls within the presumption under s. 22(3)(d). To that extent I accept the Ministry's submission that s. 22(3)(d) applies to the information.

[33] **Approach to reconciling s. 22(4)(e) and s. 22(3)(d)**—I have found s. 22(4)(e) applies to the information about the employees past positions, functions and remuneration at multiple points in the past. It is well established that s. 22(3) does not come into play when s. 22(4) applies.²¹ For example, in Order 01-53²² the Commissioner recognized that even where s. 22(3)(d) applied to most of the information in issue, information that fell within s. 22(4)(e) was required to be released:

...even in cases such as this, where the identifying information is covered by s. 22(3)(d), any third-party identifying information that in some way relates to the third party's job duties in the normal course of work-related activities falls into s. 22(4)(e). I refer here to objective, factual statements about what the third party she [sic] did or said in the normal course of discharging her or his job duties, but not qualitative assessments or evaluations of such actions. For a similar finding, see, for example, Order 00-53, [2000] B.C.I.P.C.D. No. 57

[34] This approach vitiates any need to abandon the plain and ordinary meaning of s. 22(4)(e) in favour of a narrow interpretation of s. 22(4)(e) that avoids potentially overlapping with s. 22(3)(d).

[35] Nonetheless I wish to reconcile this decision with other orders that may at first glance appear to have taken a different approach to the interplay between s. 22(4)(e) and s. 22(3)(d).

[36] In Order F12-12,²³ Adjudicator Boies Parker observed that one of the ways previous orders have dealt with the tension between ss. 22(4)(e) and 22(3)(d) described in Order F08-04 has been to require the release of information about the activities of public employees, while requiring the withholding of

²⁰ For example Order F12-12, 2012 BCIPC 17 (CanLII); Order F10-21, 2010 BCIPC 32 (CanLII); Order F08-04, 2008 CanLII 13322 (BC IPC).

²¹ Order F12-12, 2012 BCIPC 17 (CanLII) citing *Architectural Institute of British Columbia for Information and Privacy Commissioner for British Columbia* 2004 BCSC 217; Adjudication Order No. 2, 1994 CanLII 1208 (BC IPC).

²² Order 00-53, 2000 CanLII 14418 (BC IPC) at para. 40.

²³ Order F12-12, 2012 BCIPC 17 (CanLII).

information that would identify those specific employees. However, that would not work in this case because the request is about a specific named employee, so it will be clear to the applicant that any information released relates to the employee named in the applicants request for information. Further, notwithstanding the way the tension between ss. 22(4)(e) and 22(3)(d) can be addressed as described above, releasing information about an individual employee is not inconsistent with the correct operation of s. 22(4)(e), which contemplates the release of personal information.²⁴ As stated in Order 00-13²⁵, s. 22(4)(e) must be given its full effect:

The very essence of s. 22(4) is the fact that it is, statutorily, not an unreasonable invasion of a third party's personal privacy if the information is about that person's position, functions or remuneration as an officer or employee of a public body. "Personal information" is, by definition, "recorded information about an identifiable individual".

To say that s. 22(4)(e) covers general information regarding public service job descriptions and qualifications but that it does not extend to information about position, functions or remuneration "which is private to a public servant" is, with respect, to rob s. 22(4)(e) of its efficacy.

Section 22(4)(e) deals with information that by definition includes private information of a public servant relating to the listed subjects.

[37] Some orders have found that a third party's name, position and other identifying information, while ordinarily within s. 22(4)(e) may fall within s. 22(3)(d) because in context the information cannot be said to be "about" a third party's position, function, or remuneration as required by s. 22(4)(e).²⁶

[38] In Order F10-21 and Order 01-53, names and other identifying information were considered part of a third party's employment history under s. 22(3)(d), because that information was in the context of a workplace investigation and therefore was not *about* a third party's position, functions or remuneration. Order F14-18²⁷ is another order that closely examined the context of the information in issue to assist in determining whether it fell within ss. 22(4)(e) or 22(3)(d).

[39] In the case before me, the information in issue comes from the employee's personnel file and is "about" their position, function or remuneration. As in Order F12-12, none of the information is contained in an investigation report, though the applicant may be seeking the information in order to explore potential misconduct. Also, as was stated in that Order, the applicant's intended

²⁴ See for example Order 01-53, 2001 CanLII 21607 (BC IPC) at para 40.

²⁵ Order 00-13, 2000 CanLII 6591 (BC IPC) at para. 5.1.

²⁶ See for example Order F11-04, 2011 BCIPC 4 (CanLII) at para 16.

²⁷ Order F14-18, 2014 BCIPC 21 (CanLII).

use of the information does not determine whether it must be withheld under FIPPA.²⁸

[40] **Summary regarding s. 22(4)(e)**—Section 22(4)(e) needs to be applied carefully, so that any information in a record that is not about the third party's position, functions and remuneration is separately considered in light of s. 22(3) and s. 22(2) of FIPPA. Careful severing can ensure that both s. 22(4)(e), s. 22(3)(d) and other factors in s. 22 are given full effect as the Legislature intended.

[41] I find that s. 22(4)(e) applies to the information about the named employee's position, functions and remuneration. This information is mostly found in employment offer and appointment letters that set out the employee's position and the important conditions of their employment including remuneration. I have highlighted in the copy of the records accompanying the Ministry's copy of this Order the information to which s. 22(4)(e) applies.

[42] I will now proceed to consider the remaining personal information in the employee's personnel file, including the named employee's resume and other records. References to personal information below do not include information to which s. 22(4)(e) applies.

[43] **Presumption of Invasion of Privacy – s. 22(3)**—The next step is to determine whether any of the presumptions set out in s. 22(3) apply. Section 22(3) provides the circumstances in which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. It states in part:

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

[44] **Section 22(3)(d)**—The Ministry does not specifically identify which information it believes is subject to s. 22(3)(d) but says that s. 22(3)(d) applies to "much of the information, including the employee's resumes, performance appraisals and all position appointment letters."

²⁸ Order F12-12 at para. 29.

[45] I have already discussed the scope of s. 22(3)(d) in considering its relationship to s. 22(4)(e) above. In summary, section 22(3)(d) applies to personal information that “relates to” the employment history of a third party. Previous orders have held that this provision applies to certain contents of a personnel file, the details of disciplinary action taken against employees, performance appraisals of employees and materials relating to investigations into workplace behaviour.²⁹

[46] The records contain copies of various iterations of the third party’s resume at different points in time. The resumes describe the educational history of the employee, as well as his employment and occupational experience. The contents of a resume are the sort of information that has been consistently withheld in previous orders.³⁰ In this case, the information the Ministry severed clearly reveals the employee’s employment, occupational and educational history under s. 22(3)(d). Some of the records also contain personal identifiers for the employee for payroll and personnel management. These do not fall within s. 22(4)(e) and relate to the employee’s employment history, so they are captured by s. 22(3)(d). A performance plan and some information in records dealing with a secondment arrangement for the employee also contains information about the employee’s employment history that falls within s. 22(3)(d). The disclosure of this information is presumed to be an unreasonable invasion of the employee’s privacy.

[47] The applicant says that the resume information cannot be subject to s. 22(3)(d) because at the time the resume was tendered the employee had no employment history with the BC public service. However, s. 22(3)(d) applies to any employment history in the custody or under the control of the public body, regardless of where that history was acquired. I find that the named employee’s resumes contain employment history within the scope of s. 22(3)(d). I also note that for some of the resumes, the employee did have employment history with the BC public service.

[48] **Section 22(3)(g)**—The Ministry also submits that it is obvious that s. 22(3)(g) applies to some of the information because it is personal recommendations or evaluations, character references or personnel evaluations about the third party employee.

[49] The applicant’s submission accepts that any information that falls within this class in the resumes should be severed.³¹

²⁹ F12-12 at para 31.

³⁰ See for example Order F09-24; 2009 CanLII 66961 (BC IPC); Order No. 54-1995, 1995 CanLII 1713 (BC IPC); Order No. 128-1996, 1996 CanLII 1324 (BC IPC); Order 00-48, 2000 CanLII 14413 (BC IPC); Order 01-18, 2001 CanLII 21572 (BC IPC); Adjudication Order No. 2, 1994 CanLII 1208 (BC IPC).

³¹ At para 53.

[50] I have reviewed the withheld information closely and some of it clearly falls within s. 22(3)(g). The information to which s. 22(3)(g) applies includes personal recommendations or evaluations, character references and personnel evaluations about the third party that appear in various documents in the employees personnel file. There is a presumption that disclosure of this information would be an unreasonable invasion of the employee's privacy. Some of this information is also subject to the presumption in s. 22(3)(d). Overall, all of the withheld information that does not fall within s. 22(4)(e) is subject to a presumption under ss. 22(3)(d) or (g) or both.

[51] **Other Factors – s. 22(2)**—The presumption that disclosure of the withheld information that falls within ss. 22(3)(d) and (g) would be an unreasonable invasion of the third party's privacy can be rebutted. Section 22(2) requires that public bodies must consider all relevant factors, including those listed in s. 22(2), in determining whether disclosure of personal information is an unreasonable invasion of privacy.

[52] The factors listed in s. 22(2) that arise in this case are:

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

[53] The Ministry submits that there are no factors under s. 22(2) in favour of rebutting the presumptions of s. 22(3).

[54] The applicant argues that ss. 22(2)(a) and (c) of FIPPA are relevant to the various types of information he is seeking in his request. The applicant did not raise s. 22(2)(f) but I have determined that it is a relevant factor to consider in this case. I will consider each subsection in turn.

[54] Regarding s. 22(2)(a), the applicant argues that s.22(2)(a) weighs in favour of releasing the information. The Ministry says there is no evidence that the disclosure of the types of records at issue would subject the activities of the government of BC to public scrutiny, and the records have no broad or public significance.

[55] As noted in Order F12-12, s. 22(2)(a) relates to scrutiny of a public body rather than an individual. As in that case, it is not clear here how disclosure of the records in issue will promote public scrutiny of the Ministry.

[56] In Order 00-48 and Order 01-18, the applicants did not persuade the Commissioner that disclosure of job candidates' educational and occupational histories was desirable for the purpose of public scrutiny of the public body's hiring practices. Similarly in Order 02-56, Adjudicator Francis stated:³²

I am also not convinced that information relating to an assessment of an individual's candidacy for employment or performance of his or her employment duties adds anything meaningful to the public's understanding of a public body's activities, certainly not in this case.

[57] With the benefit of having reviewed the information at issue, despite the applicant's vigorous argument to the contrary, I reach the same conclusions with respect to the information in issue as was reached in the orders just canvassed. Despite the applicant's stated desire to use the information to hold public bodies accountable for their hiring practises, release of this information will not appreciably progress this objective. The information requested on its own does not allow an assessment of whether the Ministry made a merit-based hire because the only candidate about which there is information is the employee, and there is no information about the Ministry's assessment process that led to its hiring decision. Without limiting the applicant's rights of access to information under FIPPA I also note, as the Ministry does in its reply submission,³³ that the *Public Service Act* requires that appointments are merit based, and compliance may be independently reviewed by the Office of the Merit Commissioner.

[58] The applicant argues s. 22(2)(c) applies here because the information will assist his intent to seek legal redress against the third party employee and the Ministry.

[59] The applicant acknowledges in his submission the four part test for the application of s. 22(2)(c) outlined in previous orders:³⁴

- 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;

³² At para 82.

³³ At para 6.

³⁴ See for example Order 02-23, 2002 CanLII 42448 (BC IPC) at para 19.

- 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.

[60] He argues that the four part test is met. However, having the benefit of reviewing the records, I am not satisfied that the test is met. One reason is that I am not satisfied the information in issue would have any bearing on or significance for determination of any of the potential rights mentioned in the applicant's submission. The remaining information in issue comprises historic resumes of the third party employee and personnel evaluation type materials, neither of which are particularly relevant or necessary for a proceeding, even considering the wide ranging nature of the proceedings the applicant states he intends to bring against the Ministry and the named employee.

[61] Whether information was supplied in confidence is a factor listed in s. 22(2)(f). The applicant refers to the lack of evidence that the resume information was submitted in confidence. There is no evidence before me that the applicant's resumes were submitted explicitly in confidence. However, I note that resumes typically are supplied implicitly in confidence because of their sensitive contents and the nature of the job application process typically assures applicants confidentiality. I therefore place little weight on the absence of an explicit statement of confidentiality in the resumes and I find that s. 22(2)(f) is a factor in favour of withholding the information at issue.

[62] **Other factors**—Specifically in relation to the resume information, the applicant submits that the named employee waived any privacy rights when he submitted his application for a job in the BC public service. The applicant does not cite any authority in support of this view. The resume information is subject to the usual weighing of factors in s. 22. Previous orders have found disclosure of resumes submitted to public bodies are presumed to be an unreasonable invasion of a third parties personal privacy under s. 22(3)(d). That presumption may be rebutted by factors in s. 22(2) or other factors.

[63] **Section 22(1)**—In conclusion, I am satisfied that there are no other factors in s.22(2) or generally that are relevant to whether the s. 22(3) presumption is rebutted. Accordingly, I conclude that the presumption has not been rebutted and the information subject to a presumption should continue to be withheld under s. 22(1).

[64] **Summary**—I find that some information about the named employees previous position, functions and remuneration must be disclosed under s. 22(4)(e). Other information must be withheld because it is presumed to be an

unreasonable invasion of the named employees privacy under ss. 22(3)(d) and or s. 22(3)(g) and no factors, including those in s. 22(2) rebut the presumption.

CONCLUSION

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

1. Subject to para. 2 below, I require the Ministry to withhold under s. 22 the information in issue.
2. I require the Ministry to disclose under s. 22(4)(e) of FIPPA the information highlighted in the copy of the records that accompany the Ministry's copy of this decision, on or before November 5, 2014. The Ministry must copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

September 24, 2014

ORIGINAL SIGNED BY

Hamish Flanagan

OIPC File No.: F12-51635