



OFFICE OF THE  
INFORMATION & PRIVACY  
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Order F15-11

## FRASER HEALTH AUTHORITY

Ross Alexander  
Adjudicator

March 10, 2015

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**Summary:** An applicant requested a Fraser Health Authority (“FHA”) investigation file about a workplace complaint she made to FHA. FHA disclosed nearly all of the records, but withheld part of one page of notes on the basis that disclosure would be an unreasonable invasion of the personal privacy of third parties (s. 22 of FIPPA). The adjudicator determined that FHA was required to refuse to disclose the withheld information under s. 22 of FIPPA.

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

**Authorities Considered: B.C.:** Order F14-18, 2014 BCIPC 21 (CanLII); Order 01-53, 2001 CanLII 21607.

## INTRODUCTION

[1] This inquiry relates to an applicant's request to the Fraser Health Authority (“FHA”) for a copy of the entire investigation file for a workplace complaint made by the applicant against her supervisor.

[2] FHA disclosed most of the records, but withheld some information on the basis that the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) exempts it from disclosure. Specifically, it withheld information on the basis that disclosure would reveal policy advice and recommendations (s. 13 of FIPPA) and

that disclosure would be an unreasonable invasion of a third party's personal privacy (s. 22 of FIPPA).

[3] The applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") review FHA's decision to withhold information on two pages of notes contained in the responsive records. FHA was withholding part of one page under s. 13 of FIPPA and part of the other page under s. 22.

[4] OIPC mediation did not resolve the matter, and the applicant asked that this matter proceed to inquiry. Before the parties provided their submissions, FHA disclosed to the applicant the information it was withholding under s. 13. Therefore, s. 13 of FIPPA is no longer at issue. The applicability of s. 22 to the information in dispute is the sole remaining issue.

## ISSUE

[5] The issue in this inquiry is whether FHA is required to refuse access to the withheld information because disclosure would be an unreasonable invasion of the personal privacy of a third party under s. 22 of FIPPA.

[6] Section 57(2) of FIPPA places the burden on the applicant to establish that the disclosure of personal information would not be an unreasonable invasion of third party personal privacy.

## DISCUSSION

[7] **Information in Dispute** — The information in dispute is a portion of one page of handwritten notes taken by a FHA human resources consultant during a telephone conversation with the applicant's supervisor. These notes were taken during a FHA "Respectful Workplace Policy" investigation that resulted from a complaint the applicant lodged against her supervisor.

[8] **Preliminary Matters** — The applicant is concerned about FHA's use of *in camera* submissions and evidence in this inquiry. She surmises that the *in camera* information contains contextual arguments and rationalizations for how the withheld information falls under s. 22 of FIPPA. The applicant submits that she is not in a position to respond to FHA's argument that the withheld information relates to the work circumstances of third parties or its argument that a summary of the withheld information cannot be provided under s. 22(5) of FIPPA. She submits that her inability to know the case she has to meet breaches the rules of natural justice and procedural fairness.

[9] A fair inquiry process requires that applicants receive as much information as is reasonable in the circumstances to allow them to make effective submissions. However, public bodies cannot be required to provide evidence

and submissions to applicants in the inquiry process if that information would disclose the very information that is at issue, or if it is otherwise exempt from disclosure under FIPPA.

[10] In this case, FHA requested and received approval from the OIPC to submit certain information *in camera* based on the principles stated above. While I acknowledge that there is a significant amount of *in camera* material in this case, I am satisfied that the applicant has sufficient information available to her to enable her to know the case she has to meet. In my view, based on the materials before me, it is not unfair or a breach of the rules of natural justice to proceed with this inquiry.

[11] **Section 22** — Section 22 of FIPPA requires public bodies to refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy. Since s. 22 only applies to personal information of third parties, it is first necessary to determine whether the information is personal information of third parties. Section 22(4) then lists circumstances where disclosure is not unreasonable. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, public bodies must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.

[12] The applicant submits that s. 22 does not apply because release of the information is relevant to a fair determination of her rights pursuant to s. 22(2)(c) of FIPPA. She states that denying access to the withheld information will severely prejudice her ability to participate in the investigation and resolution of her Respectful Workplace Policy complaint because the information may contain content that supports her position, or false information that FHA may use in assessing the merits of her complaint.

[13] FHA submits it is required to refuse to disclose the withheld information because s. 22 applies. It states there is a presumption that disclosure of this information would be an unreasonable invasion of third party personal privacy, since it is employment history information pursuant to s. 22(3)(d). It submits that the information contains intertwined employment history information of both the applicant and other FHA employees, and that s. 22(3)(d) applies to all of the withheld information because it cannot reasonably be severed so that it only reveals the applicant's personal information. It also submits that s. 22(2)(f) supports withholding the information because it was supplied in confidence. Further, it states that s. 22(2)(c) is not applicable because it is not relevant to a determination of the applicant's legal rights, including because her Respectful Workplace Policy complaint has concluded and is not ongoing.

### *Personal Information*

[14] Section 22 of FIPPA applies to personal information of third parties. FIPPA defines personal information as “recorded information about an identifiable individual other than contact information”.<sup>1</sup>

[15] The withheld information is a FHA human resources consultant’s notes recording statements made by the applicant’s supervisor. These statements are about the applicant, the supervisor and other FHA employees. While some of this information does not expressly name these other employees, I find that these individuals would be known to, and identifiable by, the applicant and others given the content and context of the information.<sup>2</sup>

[16] For the above reasons, I am satisfied that the withheld information is about the applicant, the applicant’s supervisor and other FHA employees. Further, this information is clearly not contact information.<sup>3</sup> I therefore find that it is the personal information of these individuals.

### *Section 22(4)*

[17] Subsection 22(4) of FIPPA specifies circumstances where disclosure of personal information is not an unreasonable invasion of a third party’s personal privacy. In this case, neither of the parties suggest that s. 22(4) applies. Further, based on my review of the materials, I find that none of the circumstances in s. 22(4) apply to the withheld information.

### *Section 22(3)*

[18] Subsection 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:

- (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,
  - ...

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

<sup>2</sup> Affidavit of J. Tully at paras. 7 to 9.

<sup>3</sup> Schedule 1 of FIPPA defines “contact information” 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”.

[19] FHA submits that s. 22(3)(d) applies because the withheld information contains employment history information of FHA employees. One of those people is the applicant, but FHA submits that the information of the applicant is intertwined with the information of others, and that the information cannot reasonably be severed so that it only reveals the applicant's information. The applicant submits that she is not in a position to argue whether s. 22(3)(d) applies because FHA has provided a significant amount of *in camera* argument and evidence that she believes deal with contextual arguments and rationalizations for how the withheld information falls under s. 22(3)(d).

[20] While the applicant does not have access to the contents of the withheld information that is at issue, I do not accept her contention that she is not in a position to make submissions with respect to s. 22(3)(d). FHA's materials disclose that the withheld information is statements made by the applicant's supervisor to a FHA human resources consultant about the applicant and other FHA employees in the course of the applicant's Respectful Workplace Policy complaint. In my view, this and other information in the materials provides a reasonable basis for the applicant to make submissions about whether s. 22(3)(d) applies in this case.

[21] The issue of whether s. 22(3)(d) applies to witness statements and other evidence gathered during workplace investigations has been addressed in numerous previous orders.<sup>4</sup> Order 01-53, for example, states that information created in the course of a workplace complaint investigation that consists of "evidence or statements by witnesses or a complainant about an individual's workplace behaviour or actions" falls under s. 22(3)(d).<sup>5</sup> The withheld information in this case is portions of handwritten notes taken by a FHA human resources consultant during a telephone conversation with the applicant's supervisor as part of a workplace investigation. The information relates to a statement made as part of a workplace investigation and it is in relation to multiple FHA employees, so the information relates to the employment histories of third parties. I therefore find that the withheld information falls under s. 22(3)(d), and that there is a presumption that disclosure of the withheld information would be an unreasonable invasion of the personal privacy of third parties.

### *Section 22(2)*

[22] A presumption created under s. 22(3) can be rebutted. Section 22(2) requires that all relevant circumstances, including those specified in s. 22(2), be considered in determining whether the information can be disclosed without unreasonably invading a third party's personal privacy. This provision states in part:

<sup>4</sup> For example, Order F14-18, 2014 BCIPC No. 21 (CanLII).

<sup>5</sup> Order 01-53, 2001 CanLII 21607 (BC IPC) at para. 32.

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

...

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

...

- (f) the personal information has been supplied in confidence,  
(g) the personal information is likely to be inaccurate or unreliable,

*Fair Determination of Rights – s. 22(2)(c)*

[23] The applicant submits the withheld information should be disclosed to her because it is relevant to a fair determination of her rights pursuant to s. 22(2)(c) of FIPPA. FHA submits that s. 22(2)(c) is not a relevant factor weighing in favour of disclosure in this case.

[24] Previous orders have stated that the following test must be met for s. 22(2)(c) to apply:

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.<sup>6</sup>

[25] The applicant submits that the legal issue here is her right to make a Respectful Workplace Policy complaint to FHA, which she states is ongoing because it is not yet resolved. In response to the applicant, FHA's director of human resources<sup>7</sup> deposed an affidavit enclosing a letter from FHA to the applicant stating it had determined there had been no breach of its Respectful Workplace Policy, and that the applicant's complaint was closed. She also deposed that there is no appeal process for Respectful Workplace Policy

<sup>6</sup> For example, see Order 01-07, 2001 CanLII 21561 (BC IPC) at para. 31.

<sup>7</sup> The full job title is director of HR Consulting Services, People and Organization Development.

complaints, and provided a copy of this policy. FHA states that the applicant's Respectful Workplace Policy complaint has concluded. The applicant did not reply to FHA's evidence that her Respectful Workplace Policy complaint has concluded or provide any evidence of an appeal.

[26] Based on the materials before me, I find that part two of the above test is not met for the Respectful Workplace Policy complaint because the proceeding has already been completed. Further, since there is no proceeding with respect to this complaint, part four of the above test is not met because the personal information is not necessary in order to prepare for a proceeding or to ensure a fair hearing.

[27] FHA also identified two other proceedings it has with the applicant. One of these proceedings is a grievance a union filed on behalf of the applicant. However, FHA states that this grievance does not relate to interactions or communications between the applicant and her supervisor, and also that disclosure of the withheld information would have no bearing on the grievance. The applicant did not provide any materials with respect to this proceeding. The second proceeding raised by FHA relates to a claim the applicant made to WorkSafe BC. FHA submits that the Workers' Compensation Appeal Tribunal hearing process that has resulted from this claim has already been completed, and the parties are awaiting the decision.

[28] Based on the materials before me, I find that s. 22(2)(c) does not favour disclosure regarding the two proceedings identified by FHA. For the union grievance, I am not satisfied that any element of the four-part test has been met, as the withheld information does not relate to the grievance. As for the WorkSafe BC matter, based on the limited information before me about that claim and the fact that there is no evidence of an upcoming hearing, I am not satisfied that parts two to four of the above test have been met.

[29] In summary, I find that s. 22(2)(c) does not favour disclosure of the information withheld by FHA.

*Supplied in Confidence – s. 22(2)(f)*

[30] Section 22(2)(f) relates to personal information that was supplied in confidence. The information at issue is notes that were recorded by a FHA human resources consultant regarding statements made by the applicant's supervisor who was the subject of a workplace investigation. Based on my review of the materials before me, including *in camera* materials and the contents of the withheld information,<sup>8</sup> I find that the withheld information was supplied in confidence. This weighs in favour of withholding the information.

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<sup>8</sup> Affidavit of J. Tully at para. 7.

*Inaccurate or Unreliable Information – s. 22(2)(g)*

[31] Section 22(2)(g) relates to personal information that is likely to be inaccurate or unreliable. As Adjudicator Flanagan stated in Order F14-47, this provision “is intended to prevent the harm that can flow from disclosing third party personal information that may be inaccurate or unreliable.”<sup>9</sup>

[32] Neither party expressly refers to s. 22(2)(g). However, in my view it is a relevant factor in this case.

[33] The withheld information is six lines of shorthand notes. Two of those lines have been crossed out (but the words are still visible), which FHA explains *in camera*. While I cannot explain my reasoning in detail because it would disclose information FHA provided *in camera*, I find that this personal information is likely to be inaccurate or unreliable.

[34] Since the information is shorthand notes without punctuation and unusual spacing, there are a few different possible interpretations of the meaning of the remaining lines. In my view, one interpretation seems more likely than the others when solely considering the record itself on its face.<sup>10</sup> However, when also considering the other evidence and background materials before me, a different intended meaning is much more probable. This second meaning is more consistent with the supervisor’s *in camera* evidence, and it is information that the applicant already knows.<sup>11</sup>

[35] The second meaning conveys materially different personal information than the first one. Given that the plain meaning of this record itself conveys different personal information than the likely intended meaning, and that this plain meaning likely conveys inaccurate or incorrect information, I find that the personal information is likely to be inaccurate or unreliable under s. 22(2)(g).

[36] In summary, I find that s. 22(2)(g) is a circumstances that favours non-disclosure of all of the information at issue.

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<sup>9</sup> Order F14-47, 2014 BCIPC 51 (CanLII) at para. 34.

<sup>10</sup> This is particularly the case when the four remaining lines are considered without regard to the two crossed out lines. If this is the correct interpretation, the applicant knows some but not all of the personal information. The personal information the applicant knows is intertwined and inextricably linked with the personal information she does not know.

<sup>11</sup> It is apparent that the applicant already knows this information because it is part of evidence that was adduced on behalf of the applicant. While the applicant does not necessarily know that the supervisor made these same comments to FHA’s human resources consultant, she knows he made this statement to one or more other people. Given the content and context of the information (including the identity/role of who the applicant already knows the supervisor told this information to), in my view this difference is not a material distinction in this case.

[37] **Determination of Section 22** — In summary, the withheld information is the personal information of the applicant and third parties. There is a presumption that disclosure of this information would be an unreasonable invasion of third party personal privacy because it relates to their employment histories under s. 22(3)(d) of FIPPA. Further, the information was supplied in confidence and is likely to be inaccurate or unreliable, which favours a finding that disclosure would be unreasonable. However, the fact that it contains the applicant's own personal information (and that she already knows at least aspects of the personal information) favours disclosure.

[38] After considering the materials before me and the relevant factors, I find the presumption that disclosure of the withheld information would be an unreasonable invasion of a third party's personal privacy has not been rebutted. Consequently, FHA is required to refuse to disclose this information under s. 22 of FIPPA. Further, FHA is not required to provide the applicant with a summary of the information under s. 22(5) because disclosure would disclose the identities of other third parties.

## **CONCLUSION**

[39] For the reasons given above, under s. 58 of FIPPA, I order that FHA is required to refuse to disclose the information at issue pursuant to s. 22 of FIPPA.

March 10, 2015

## **ORIGINAL SIGNED BY**

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Ross Alexander, Adjudicator

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