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Order F15-21

The Corporation of the District of Oak Bay

Tim Mots
Adjudicator

May 7, 2015

CanLII Cite: 2015 BCIPC 23
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Summary: An applicant requested the Corporation of the District of Oak Bay (“Oak Bay”) provide him with records related to a permit to renovate his home. Oak Bay provided the applicant with records responsive to his request, but withheld names, house numbers and signatures from a petition because it believed disclosure would be an unreasonable invasion of third party personal privacy (s. 22 of FIPPA). The applicant was not satisfied with Oak Bay’s response and asked the Commissioner to conduct an inquiry. Oak Bay requested the Commissioner exercise her discretion under s. 56 of FIPPA to not hold an inquiry. The adjudicator found that it was not plain and obvious that disclosure of the petitioners’ personal information would be an invasion of their personal privacy under s. 22; therefore, Oak Bay’s request that an inquiry not be held was denied.

Statutes Considered: British Columbia *Freedom of Information and Protection of Privacy Act*, ss. 22 and 56; *Community Charter*, s. 82; Ontario *Municipal Freedom of Information and Protection of Privacy Act*, s. 14(1).

Authorities Considered: B.C.: Order F14-39, 2014 BCIPC 42 (CanLII); Order F08-11, 2008 CanLII 65714 (BC IPC), Order 01-53, 2001 CanLII 21607 (BCIPC). **ON.:** Order MO-1506, 2001 CanLII 26201 (ON IPC).

INTRODUCTION

[1] The applicant received a decision from Oak Bay’s Board of Variance allowing him to make renovations to his home. The applicant’s neighbours disapproved of the Variance Board’s decision and petitioned Oak Bay’s council to review the Variance Board’s decision. This delayed the issuing of the applicant’s permit.

The applicant requested bylaw enforcement records, letters, emails and petitions related to the permit to renovate his home. Oak Bay provided the applicant with responsive records but withheld information from a petition under s. 22 (disclosure harmful to personal privacy) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[2] The applicant asked the Office of the Information and Privacy Commissioner (“OIPC”) to review Oak Bay’s decision to withhold information from the petition. He also asked about records he believed were missing from the response package. Oak Bay reconsidered its decision and released additional information to the applicant. However, Oak Bay continued to withhold personal information contained in the petition. Attempts to resolve this matter through mediation were unsuccessful. The applicant asked that this matter proceed to an inquiry under Part 5 of FIPPA.

[3] Oak Bay asks that the Commissioner exercise her discretion under s. 56 of FIPPA to not hold an inquiry under Part 5 of FIPPA. It submits that it is plain and obvious that disclosure of the petition names, house numbers and signatures would be an unreasonable invasion of third party personal privacy, so disclosure of that information is not permitted under s. 22 of FIPPA.

ISSUE

[4] Should the Commissioner exercise her discretion under s. 56 of FIPPA to not hold an inquiry to review Oak Bay’s decision to withhold information because it is plain and obvious that s. 22 of FIPPA applies?

[5] **Information at issue** - Oak Bay is withholding the names, house numbers and signatures from a one-page petition and its cover letter.

DISCUSSION

[6] Section 56(1) of the Act reads as follows:

Inquiry by Commissioner

56(1) If the matter is not referred to a mediator or is not settled under section 53, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[7] A number of previous orders have set out the principles for the exercise of discretion under s. 56 of FIPPA. In Order F08-11 Senior Adjudicator Francis provided a list of principles to follow when exercising discretion under s. 56 of FIPPA. She states:

- the public body must show why an inquiry should not be held,
- the respondent (the applicant for records) does not have a burden of showing why the inquiry should proceed; however, where it appears obvious from previous orders and decisions that the outcome of an inquiry will be to confirm that the public body properly applied FIPPA, the respondent must provide “some cogent basis for arguing the contrary”,
- the reasons for exercising discretion under s. 56 in favour of not holding an inquiry are open-ended and include mootness, situations where it is plain and obvious that the records fall under a particular exception or outside the scope of FIPPA, and the principles of abuse of process, *res judicata* and issue estoppel,
- it must in each case be clear that there is no arguable case that merits an inquiry.¹

[8] I have taken this approach in this case.

[9] 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. It reads:

Disclosure harmful to personal privacy

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.

[10] Past orders have discussed how s. 22 is applied.² First, it must be determined whether the information at issue is personal information. Personal information is defined in Schedule 1 of FIPPA as “recorded information about an identifiable individual other than contact information”, and 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.”

[11] Next, one must consider s. 22(4), which identifies situations where disclosure of personal information is not unreasonable. If s. 22(4) does not apply, one must consider s. 22(3), which sets out certain types of personal information whose disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. These presumptions may be rebutted. Whether or not a presumption applies, one must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosure would constitute an unreasonable invasion of a third party's privacy.

¹ Order F08-11, 2008 CanLII 65714 (BC IPC) at para. 8.

² See, for example, Order 01-53, 2001 CanLII 21607 (BCIPC).

[12] I will apply the above approach to determine whether, as Oak Bay submits, the application of s. 22 is plain and obvious or open to argument.

Oak Bay's submissions

[13] Oak Bay states it is plain and obvious that s. 22 applies to the information withheld from the records.

[14] Oak Bay points out that it has released all the information in the petition and cover letter including the street names where the signatories live. It has only withheld the identities, signatures and house numbers of the signatories. Oak Bay states that the petition was received after the matter was decided and it formed no part of the decision or permitting process. Oak Bay notes that its practice is to not publicly disclose correspondence received subsequent to a permitting decision, when that information formed no part of the public agenda.

[15] Oak Bay argues that nowhere in the petition do the individuals consent to the disclosure of their personal information. Oak Bay spoke to some of the individuals who signed the petition, and they said they did not want their personal information disclosed to the applicant. These petitioners said that they believed disclosure of their names would be an unreasonable invasion of their personal privacy. Some petitioners expressed concerns that disclosure may resurrect bitter feelings between the applicant and the neighbourhood.

[16] Oak Bay comments on the applicant's argument that this document is a petition within the meaning of s. 82 of the *Community Charter*,³ which states:

Petitions to council

- 82(1) A petition to a council is deemed to be presented to council when it is filed with the corporate officer.
- (2) A petition to a council must include the full name and residential address of each petitioner.

[17] Oak Bay notes that petitions described in s. 82 normally address "local area services", which is not the case here. Oak Bay maintains that its practice is to not disclose the personal information contained in petitions when the matter has already been decided and the petition cannot affect the outcome of the decision.

³ RSBC 2003, c. 26.

[18] In its reply to the applicant's submission, Oak Bay argues that the applicant has failed to prove that disclosure would not be an unreasonable invasion of the third parties' personal privacy and asks that an inquiry not be held.

Applicant's submissions

[19] The applicant argues that the petitioners' personal information must be available to the public to hold Oak Bay accountable. In general the applicant believes that petitioners do not expect to remain anonymous when signing a petition since they are lending their support to a particular issue. He points out that they did not express a desire in the petition to remain anonymous. He argues that the petitioners had no expectation of privacy when they were canvassed by those in his neighbourhood collecting signatures and they would have known that the petition was to be submitted to Oak Bay, its Corporate Officer and the Mayor and Council.

[20] The applicant argues that ss. 82 and 212 of the *Community Charter* set out guidelines for petitions. Section 212 reads:

Petition for local area service

212(1) The persons who may petition for a local area service are the owners of parcels that would be subject to the local service tax for the service.

[21] He believes these *Community Charter* petitions are similar to the petition at issue here, and Oak Bay should disclose the signatories' names for the purpose of transparency. He states failure to disclose this information "...could lead to issues regarding falsification, misrepresentation or nepotism."

[22] The applicant notes that there is already animosity in his neighbourhood related to his receipt of a permit variance. Neighbours have approached him and expressed their displeasure with him. In one case, the applicant states, he was so concerned he reported the encounter to the police.

Analysis

[23] The information at issue is personal information because it is recorded information about identifiable individuals and it is not "contact information" because it is not their business or work contact information.

[24] Order F14-39 is the only BC Order that I am aware of that directly addresses personal information contained in a petition. In Order F14-39, Adjudicator Alexander stated that individuals who sign a petition will view the personal information of those who signed the petition before them, and they know that their signature will be seen by

those who sign after them. The adjudicator referenced Ontario Order MO 1506 in his discussion.

[25] The circumstances in Ontario Order MO 1506 are similar to those in this case⁴. The adjudicator examined whether s. 14(1)(a) of the *Municipal Freedom of Information and Protection of Privacy Act* (“MFIPPA”) applied to a petition requested by an applicant. That section reads:

- 14(1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
- (a) upon the written request or consent of the individual, if the record is one to which the individual is entitled to have access;
- ...

[26] Section 14(1)(a) of the MFIPPA is similar to s. 22(4)(a) of FIPPA, which reads:

- 22(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
- (a) the third party has, in writing, consented to or requested the disclosure,
- ...

[27] The petition in MO 1506 consisted of a statement supported by a number of signatories who were attempting to influence a Township Council's decision making. The Township released the petition with the exception of the petitioners' personal information. The adjudicator pointed out that by their very nature petitions are not intended to be kept secret. Individuals express their collective views on an issue, voluntarily sign a petition with respect to that issue and submit the petition to a public body in an attempt to influence it. They will see the personal information of others who have signed the petition. They expect that the petition will be circulated to others and ultimately to those individuals who they are trying to influence. Under these circumstances they knowingly forego some element of personal privacy. In essence they have implicitly consented to the distribution of the petition. The adjudicator rejected the argument that the public body was required not to disclose personal information under s. 14(1)(a) of MFIPPA.

⁴ Ontario Order MO-1506, 2001 CanLII 26201 (ON IPC); See Also: Ontario Orders 154 and 176.

Finding on s. 56

[28] I have taken into consideration Oak Bay's submissions about why disclosure of the petitioners' personal information would be an unreasonable invasion of their personal privacy. I have also considered the applicant's submissions about why he believes disclosure is necessary. I find it is at least arguable, based on Order F14-39 and MO-1506, that disclosure of personal information contained in a petition may not be an unreasonable invasion of third party privacy. Therefore, in my view, it is not plain and obvious that disclosure of the third parties' personal information would be an unreasonable invasion of their personal privacy under s. 22 of FIPPA.

[29] An inquiry is the proper forum to decide this matter.

CONCLUSION

[30] Oak Bay bears the burden of establishing why its application for s. 56 would be granted. In my opinion, Oak Bay has not established that it is plain and obvious that it is required to refuse to disclose the petitioners' personal information under s. 22(1) of FIPPA. Therefore, Oak Bay's s. 56 application is denied and an inquiry will be held under Part 5 of FIPPA.

[31] I reach this decision without drawing any conclusions about the respective positions of the parties. The ultimate determination of this matter will be decided based on the evidence and arguments both parties submit at the inquiry.

May 7, 2015

ORIGINAL SIGNED BY

Tim Mots, Adjudicator

OIPC File No.: F14-57260