Office of the Information & Privacy Commissioner for British Columbia

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Order F15-42

SCHOOL DISTRICT 57 (PRINCE GEORGE)

Ross Alexander
Adjudicator

August 21, 2015

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Summary: The mother of a School District 57 (Prince George) student requested video camera footage that was taken during a 10 day period her son spent in a modified classroom setting. The School District responded by permitting the applicant to access the footage at its office, but it decided that it was required to refuse to disclose to the applicant a copy of the footage containing the personal information of the classroom teacher and youth care worker captured on the video because disclosure would be an unreasonable invasion of their personal privacy under s. 22 of FIPPA. The adjudicator determined that s. 22 applies to the information about the classroom teacher and youth care worker. Section 22 did not apply to a RCMP officer whose image was also captured in the footage. The adjudicator determined that the applicant, medical professionals and legal professionals were entitled to access to the footage. However, the School District was not required to provide a copy of the footage to the applicant.

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

Authorities Considered: B.C.: Order F14-18, 2014 BCIPC 21 (CanLII); Order F08-13, 2008 CanLII 41151 (BC IPC); Order F12-12, 2012 BCIPC 17 (CanLII); Order 01-53, 2001 CanLII 21607 (BC IPC); Order F08-13, 2008 CanLII 41151 (BC IPC); Order F05-18, 2005 CanLII 24734 (BC IPC); Order F14-39, 2014 BCIPC 42 (CanLII); Order F08-12, 2008 CanLII 30214 (BC IPC); Order 01-07, 2001 CanLII 21561 (BC IPC); Order F12-08, 2012 BCIPC 12 (CanLII); Order F10-06, 2010 BCIPC 9 (CanLii); **AB:** Order F2008-020, [2009] A.I.P.C.D. No. 8; Order F2015-02, 2015 CanLII 4586 (AB OIPC).

Cases Considered: *British Columbia (Ministry of Public Safety and Solicitor General) v. Stelmack*, 2011 BCSC 1244.

INTRODUCTION

[1] This inquiry relates to a request to School District 57 (Prince George) (the "School District") by a student's mother on behalf of her son for all video footage of the student during a specified 10 day period.[1] During this 10 day period, the student attended school in a modified classroom setting in which there was a classroom teacher and a youth care worker, but no other students. There were four video cameras recording classroom activity, one of which had audio.

[2] The School District responded by stating that it could not provide the applicant with a copy of the video footage because disclosure would be an unreasonable invasion of the personal privacy of third parties under s. 22 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). However, it offered access to the applicant by inviting her to view the video footage at the School District's office.

[3] The applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") review the School District's decision to withhold the video footage from her.

[4] Shortly after the applicant requested a review by the OIPC, the applicant and her husband twice attended the School District's offices to view the video footage. School District staff attempted to set up all four video recordings to run simultaneously so the applicant could see the recording from all four vantage points at the same time and with the audio. However, they did not play in synchronization on either occasion, which resulted each time in the applicant and her husband deciding to leave without viewing all of the footage.[2]

[5] As the OIPC review process continued, the School District agreed to have a service provider mask the faces and voices of the third parties in the video footage, and to disclose this severed footage to the applicant in stages.[3] As such, the School District revised its response and released one day of severed footage to the applicant.

[6] The applicant seeks an unsevered copy of the video footage without any faces or voices obscured, so she requested that this matter proceed to inquiry.

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[1] Section 3 of the *Freedom of Information and Protection of Privacy Regulation* specifies who may act for a minor. The School District acknowledges that the student's parent is acting on behalf of the student who is a minor, so this is not an issue in this case.

[2] While it is not expressly stated in the materials before me, it is apparent that the applicant has viewed some – but not all – of the video footage.

[3] The School District advises that the severing process is time intensive and costly.

ISSUE

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

[8] 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.

[9] In addition to the issue listed in the Notice of Inquiry, the applicant raises a number of additional issues such as provisions of FIPPA other than s. 22 and federal privacy legislation. I will address these additional issues below as preliminary matters, after providing a brief background and describing the information that is at issue.

DISCUSSION

[10] **Background –** The relationship between the applicant, her husband and School District staff has been acrimonious. They have had disagreements involving the child, and in relation to the applicant and her husband's other children. The applicant describes herself and her husband as "strong advocates" for their children, which she says has put them at odds with the School District.

[11] The child was enrolled as an elementary student in the School District. The child had a number of "emotional outbursts" or "behavioural episodes" while in classrooms.[4] The applicant advises that the child has a neurological disorder. In the applicant's view, the incidents occurred because the School District failed to meet her son's needs and properly accommodate him. She states that School District staff interacted with her son using behavioral interventions that were inappropriate because they triggered neurological issues.

[12] In response to one particularly severe behavioural episode, staff members restrained the child in an office until his father arrived to take him home. As a result of that incident, the applicant and her husband were asked to keep their son at home until a "safety plan" could be developed.

[13] One of the school administrators involved in this incident took notes and provided them to the applicant. The applicant posted portions of these notes with her commentary on social media. This post was later followed by lengthy posts by the applicant and her husband about the child, and their views about the

[4] This is terminology used in several affidavits. For ease of reference, I will also use this terminology.

decisions and actions of School District employees regarding their child. These posts are generally critical of the School District and School District employees.

14] After the development of a "safety plan", the child returned to the school. He was later placed in a short-term elementary support program ("ESP") at a different school, with the objective of assisting the reintegration of the child into a standard classroom setting.

[15] The child was the only student in his classroom for his time in the ESP. He was taught by a teacher and a youth worker. One of the tools the ESP uses is to record students when they are having an emotional moment, so it can be reviewed at a later date with the student and his or her parents to see and reflect on the child's behaviours. For the child's time in the ESP, there were four video cameras installed in the corners of the classroom for this purpose.

[16] The child had a behavioural episode while in the ESP. In accordance with the child's "safety plan", the RCMP was called.[5] The RCMP attended the classroom, and the child's parents picked him up from school.

[17] There is audio and video footage of the child's 10 days in the ESP classroom from the four video cameras,[6] including footage of the day of the behavioural episode when the RCMP officer attended the classroom.[7]

[18] **Records at issue –** The responsive records are audio and video footage of four cameras located in the child's classroom during a 10 day period.

[19] The information at issue is the personal information of people other than the child and the applicant. The School District has already provided the applicant with severed footage of the day of the behavioural episode (*i.e.* the personal information of third parties is blurred). Since it is time intensive and costly for the School District to pay a service provider to sever the footage, it is waiting on the outcome of this inquiry before severing the remainder of the footage (*i.e.* severing will be unnecessary if it is required to disclose the unsevered footage).

[5] I note that the materials do not suggest that this behavioral episode was an actual safety issue that the teacher could not handle. Further, the RCMP's view was that the child's behaviour was not a police issue: RCMP occurrence report at Exhibit "A" to the applicant's initial submissions.
[6] Only one of the four cameras has audio.
[7] I note that the School District did not monitor the video on an ongoing basis, and it took steps to secure and limit access to the video footage. The footage was kept on a server in a locked room. Further, access to the recordings was password protected, and the School District had protocols in place to limit access to the information.

Preliminary Matters

Section 25

[20] In addition to addressing s. 22, the applicant alleges in her submissions that ss. 25(1)(a) and (b) of FIPPA apply to her request. This section relates to information that must be disclosed because it is about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or because it is otherwise clearly in the public interest. However, the applicant did not raise s. 25 in her request for review to the OIPC, and this issue is not listed in the Notice of Inquiry or Investigator's Fact Report. In my view it is inappropriate to add s. 25 as an issue at this late stage.

[21] In any event, given both the plain meaning of s. 25 and its context as a provision that overrides all other provisions in FIPPA, there is little doubt that s. 25 sets a high threshold that only applies in the most serious of situations. The video footage in this case does not disclose any obvious instances of third parties mistreating the child, including on the day of the behavioral episode. Further, the applicant does not point to any specific incident of concern, despite viewing portions of the video footage (including receiving a copy of severed footage for the day of the behavioural episode). This is not the type of situation where the information at issue has the clear gravity needed for s. 25 to apply.

Jurisdiction and the Scope of this Inquiry

[22] The parties acknowledge that this inquiry only relates to whether the withheld information in the video footage must be disclosed, and that it is not otherwise intended to determine their disputes. However, the applicant relies on the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and the federal privacy *Personal Information Protection and Electronic Documents Act* ("PIPEDA") in her submissions. It is not within my jurisdiction or the scope of this inquiry to determine whether the School District breached the *Charter* or PIPEDA, or to adjudicate any other issues between the parties.

[23] Further, the applicant questions in her reply submissions whether the personal information in the video footage was properly authorized to be collected under s. 26 of FIPPA. However, s. 26 of FIPPA is not listed in the Notice of Inquiry or Investigator's Fact Report, and the School District did not have an opportunity to respond to this argument that was raised in reply. This issue is not within the scope of this inquiry, and I will not consider it further. The only issue before me is whether the applicant is entitled to the video footage the School District states FIPPA requires it to refuse to disclose under s. 22.

[24] The applicant also submits that if I order the School District to disclose the footage, I should require it to create a record that combines the footage from

multiple video cameras because otherwise the recording is not conducive to a behavioural review of the child.[8] While the applicant does not refer to FIPPA in making this request, in effect it is an argument that the School District must create a record pursuant to s. 6(2) of FIPPA. However, s. 6 is not an issue listed in the Notice of Inquiry, the applicant raised this issue in reply, and the School District has not had an opportunity to respond to this submission (including whether it can create such a record, and, if possible, the time and cost required to do so). I therefore will not further consider s. 6 of FIPPA, including the issue of whether the School District is required to combine multiple video feeds to create a new record.

Section 22

[25] 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 the personal information of one or more third party. 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.

Personal Information

[26] FIPPA defines personal information as recorded information about an identifiable individual other than contact information. Video footage and audio footage of an individual's image is their personal information.[9] Portions of the footage are of the child, the teacher, the youth worker, the applicant, the applicant's husband and a RCMP officer, with most of the footage being of the child, the teacher and the youth worker. The footage is about these people and it is obviously not contact information.[10] I therefore find that it is their personal information.

[27] It is the personal information of the teacher, the youth worker and the RCMP officer that are at issue in this inquiry. The parties' submissions relate to

[8] Applicant's reply submissions at p. 85.
[9] For example, see *British Columbia (Ministry of Public Safety and Solicitor General) v. Stelmack*, 2011 BCSC 1244 at para. 510, where the Court determined that video footage containing the image of a correctional officer was determined to be her personal information.
[10] 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".

the teacher and the youth worker. However, the applicant is seeking a completely unsevered version of the recording and the School District has severed (*i.e.* pixelated/obscured) the RCMP officer's face in the severed version of the record that it has already provided to the applicant, so I will also consider the RCMP officer's personal information.

Does s. 22(4)(e) or s. 22(3)(d) apply?

[28] Section 22(4)(e) states that disclosure of personal information about a public body employee's position, functions or remuneration is not an unreasonable invasion of a third party's personal privacy. However, s. 22(3)(d) states that disclosure of personal information that relates to a third party's employment, occupational or educational history is presumed to be an unreasonable invasion of the third party's privacy. Therefore, personal information is treated differently if it is about a public body employee's "job functions" than if it relates to their "employment history".[11]

[29] Sections 22(4)(e) and 22(3)(d) are the only relevant provisions under ss. 22(4) and 22(3) in this inquiry. The applicant submits that s. 22(4)(e) clearly applies to the withheld information, so s. 22(3)(d) does not apply. The School District submits that s. 22(4)(e) does not apply to the faces and voices of the third parties, and that the information falls under s. 22(3)(d).

[30] The issue of whether video footage in a work environment falls under ss. 22(4)(e) or 22(3)(d) has been considered in previous orders. Order F08-13 related to video footage of correctional officers and a police officer at work.[12] In that order, the adjudicator stated that the third parties' concerns about their privacy seemed to be based on the fact that the videos would identify them as employees of a public body, which "would appear to be information falling under s. 22(4)(e)".[13] However, a correctional officer appealed. On judicial review, the court determined that the correctional officer's privacy rights were not reasonably addressed, so the case was remitted for reconsideration.[14] On reconsideration of this matter in Order F12-12, it was stated that:

> [29] It is clear that information identifying public body employees may fall outside of s. 22(4)(e) in cases other than those involving investigations into workplace behaviour. In this case, the information is not contained in an investigation report, although the applicant certainly alleges misconduct and is seeking the DVRs in order to explore such misconduct. The applicant's own intended use of the information, however, does not determine whether it must be withheld under FIPPA. The information was produced as a result of

[11] Order F14-18, 2014 BCIPC 21 (CanLII).
[12] Order F08-13, 2008 CanLII 41151 (BC IPC).
[13] Order F08-13, 2008 CanLII 41151 (BC IPC) at para. 65.
[14] *British Columbia (Ministry of Public Safety and Solicitor General) v. Stelmack*, 2011 BCSC 1244.

> the routine recording of the everyday operations within VCJ. It records the Correctional Officer's "tangible activities" in the normal course of work-related activities. For that reason, the disclosure of the Correctional Officer's *activities* is within s. 22(4)(e). The fact of the Correctional Officer's employment is also likely within s. 22(4)(e).
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> [30] However, the Correctional Officer's facial image is not information "about" her position, functions or remuneration in the workplace. Her argument on the remittal, and Justice Russell's analysis, make it clear that her concern with respect to the disclosure of her image is not limited to being identified as an employee of VCJ. There is no fast rule concerning the application of s. 22 to information that identifies an individual as an employee of a public body: it depends on the circumstances of the case. Because the Correctional Officer's facial image does not provide information about her functions as an employee of a public body, I find that it is not "about" her position, functions or remuneration as a public body employee and thus does not fall within s. 22(4)(e).[15]

[31] The School District submits that the central finding above in Order F12-12 should be applied in this inquiry. It states that the recordings in this case must be severed to prevent identification of the third parties, and that s. 22(4)(e) does not apply to this information. It acknowledges that Order F12-12 indicates that "tangible activities" in the normal course of work-related activities may be considered to be information regarding position or function, but that the recordings are anything but normal in this case, and that it is highly unusual for the activities of School District students and employees to be subject to video surveillance.

[32] The applicant submits that it is necessary to consider the context of the records being requested and the purpose for which they were originally created in determining whether s. 22(4)(e) or s. 22(3)(d) apply. This includes the context in which the video footage was created, and the job functions and duties of the teacher and youth worker. She submits that the situation at issue here is different than in cases involving workplace investigations, where it has generally been determined that s. 22(3)(d) applies.[16] The applicant submits that she is asking for a recording of interactions between a single teacher, a youth care worker and the child in a classroom setting, which are workplace behaviors, actions and experience that are essential functions of the teacher's and youth worker's job positions. She further states that the information at issue here is not an opinion stated by a person, but it is information captured by a camera that must be considered to be a completely impartial neutral witness or observer. She submits that the "neutral witness" only captures "functions" and everyday duties and interactions of the teacher and youth care worker, and their verbal and

[15] Order F12-12, 2012 BCIPC 17 at paras. 29 and 30.
[16] For example, Order F14-18, 2014 BCIPC 21 (CanLII).

nonverbal communication interactions with her child in that environment. As such, the applicant submits that this is "professional", not "personal", information.

[33] Previous orders such as Order 01-53 have stated that objective, factual statements about what a third party does or says in the normal course of discharging her or his job duties falls under s. 22(4)(e).[17] Taken on its face, this favours a finding that the video footage in this case falls under s. 22(4)(e), considering that unedited video footage provides an objective record. However, in my view, there is a distinction between information in a written record and video footage.

[34] The distinction between written records and video footage was addressed to some extent in Alberta Order F2008-020, which involved video surveillance footage and an investigation report related to a publicized incident in which police officers allegedly assaulted an individual.[18] Adjudicator Raaflaub determined in that order that disclosure of the video footage would be an unreasonable invasion of personal privacy, but that disclosure of most of a related report would not. Part of the reasoning for this difference was that "the [v]ideo captures more private or intimate personal information in the form of images", and that the video itself lacked the context that existed in the report.[19]

[35] I agree with Alberta Order F2008-020 that video footage about a topic will frequently contain more detailed personal information than written information because it captures information in the form of images and audio recordings (including tone, physical identity, non-verbal body language and cues, mannerisms, etc.). In the context of ss. 22(4)(e) and 22(3)(d) of FIPPA, the distinction between video and audio recordings compared to written records may be relevant. In my view, audio and video footage about an employee is more likely to be "about" that specific employee, their actions and how they do their job compared to a written record created in the course of an employee's ordinary functions, tasks and activities. This is due in large part to the additional amount of detail that is contained in video footage compared to written records. I find that this is the case here, and that the video footage is about the specific employees, not their ordinary job functions, tasks and activities.

[36] In Order F08-13,[20] which was judicially reviewed in *British Columbia (Ministry of Public Safety and Solicitor General) v. Stelmack* [*Stelmack*][21] and then was remitted back to the OIPC and resulted in Order F12-12, a correction officer employee's face was severed, but the remainder of her body was

[17] Order 01-53, 2001 CanLII 21607 (BC IPC) at para. 40.
[18] Alberta Order F2008-020, [2009] A.I.P.C.D. No. 8.
[19] Alberta Order F2008-020, [2009] A.I.P.C.D. No. 8 at para. 114.
[20] Order F08-13, 2008 CanLII 41151 (BC IPC).
[21] *British Columbia (Ministry of Public Safety and Solicitor General) v. Stelmack*, 2011 BCSC 1244

disclosed.[22] In my view, that is not the appropriate approach in this case to separate the analysis of the third parties' faces and bodies. When the teacher's and youth worker's faces are severed out of the video footage, the remaining information does not then become about the functions of these third parties. This is because the third parties remain identifiable even if their faces are severed, due to the unsevered portions of their bodies, their clothing and the very specific context in which they were recorded.[23] In my view, severing the third parties' faces, expressions and voices does not make the remaining personal information that would be disclosed merely about their functions as an employee of the School District.

[37] For the above reasons, I find that the video and audio footage about the teacher, youth worker and RCMP officer[24] is not about their position, functions or remuneration as an employee of a public body under s. 22(4)(e). It is, however, related to their employment history under s. 22(3)(d) because it reveals how they do their jobs, so there is a presumption that disclosure of this information would be an unreasonable invasion of their personal privacy.

Section 22(2)

[38] 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:

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

[22] The body was part of the information ordered disclosed in Order F08-13, 2008 CanLII 41151 (BC IPC). Order F12-12, 2012 BCIPC 17 only addressed the employee's face.

[23] See Alberta Order F2008-020, [2009] A.I.P.C.D. No. 8 at para. 31 for a similar finding.

[24] The same reasoning on this issue about the teacher and youth work applies to the RCMP officer. However, I also note that 22(4)(e) also clearly does not apply for the RCMP officer because the RCMP officer is not the employee of a "public body" as defined by FIPPA.

> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and
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> …

[39] The applicant submits that ss. 22(2)(a) and (c) favour disclosure in this case, and that s. 22(2)(h) does not apply. The School District submits that s. 22(2)(a) weighs in favor of some form of disclosure to the applicant and her husband (*i.e.* that they receive access to view, but not copies of, the unsevered video), that s. 22(2)(c) does not apply, and that s. 22(2)(h) should be given heavy weight in determining that disclosure would be unreasonable invasion of personal privacy.

Section 22(2)(a)

[40] As stated in Order F05-18, the rationale for s. 22(2)(a) is that subjecting the activities of a public body to public scrutiny may support disclosure of third party personal information where disclosure of the information would foster the accountability of a public body.[25]

[41] The applicant submits that ss. 22(2)(a) favours disclosure in this case because she wants to review the treatment of her child under the care of the School District. She feels the treatment of her son during his time in class is in direct opposition to the recommendations the child's medical team made to the School District, and she wants to be able to examine the video – possibly with medical professionals – to determine whether the School District met her child's rights to fair treatment and accommodation of his disability. The applicant submits that there is no precedent for this case because it is in regards to the rights of a young child who is incapable of defending himself against allegations raised by the School District, and the recordings are the only impartial witness to what occurred.

[42] The School District agrees that s. 22(2)(a) weighs in favour of some form of disclosure because it is accountable to the child and his parents for the child's educational program and for its employees' efforts to manage his behaviour. It further states that one of the reasons the footage was created was to ensure that an accurate and transparent record existed in the event of an incident involving the child. In the School District's view, its approach of providing the applicant and her husband with access to, but not copies of, the unedited footage reflects the best possible balance between access and privacy rights because it reflects the fact that the applicant and her husband are aware of the identity of the teacher and the youth worker, while still preventing the dissemination of the recordings to the general public.

[25] Order F05-18, 2005 CanLII 24734.

[43] In order for s. 22(2)(a) to apply, disclosure of the information that is in dispute must be desirable for the purpose of subjecting a public body to public scrutiny.[26] In this case, the School District has already enabled the applicant to come and view the unedited audio and video footage, so those portions of the record that the applicant has viewed have already been subject to her scrutiny. It has also already provided the applicant with a copy of video footage from the day of the behavioural episode that has had the faces and voices of third parties severed from the video, and it is prepared to provide the remainder of the footage. Given that the School District has already provided the applicant and her husband with access to the unsevered footage by letting them come and view it,[27] in my view it must be desirable for the purpose of subjecting the School District to public scrutiny for the applicant to receive a copy of this unedited audio and video footage for s. 22(2)(a) to be a factor in favour of further disclosure.

[44] Having reviewed the video footage, it is not apparent to me that there were any specific actions by third parties that are desirable to expose the School District to public scrutiny. In my view, the most noteworthy part of the video footage is that the RCMP attended the classroom. However, even so, this fact is apparent from the severed video that has already been provided to the applicant, and the applicant has received records from the RCMP that confirm this (including the identity of the RCMP officer).

[45] With respect to the teacher and youth worker, the fact that the video footage relates to the care and education of a young child arguably increases the desirability for public scrutiny of the School District. However, disclosure of the information is much more about the private interest of scrutinizing minute details about how the third parties interacted with the child and to look for clues about the child's neurological disorder than it is to subject the public body to public scrutiny.[28] After considering the circumstances, I find that s. 22(2)(a) is a factor favouring disclosure of this information, but that this factor does not have very much weight.

[46] Similarly, in my view disclosure of how RCMP officers interact with the public is generally desirable for the purpose of subjecting the police to public scrutiny. However, in this case the RCMP officer's interactions with the public captured with these recordings are innocuous and the desirability of this public scrutiny is not very significant. I find that disclosure of the information about the RCMP officer is desirable for subjecting the police to public scrutiny, but that this factor has little weight.[29]

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[26] Order F14-39, 2014 BCIPC 42 (CanLII) at para. 37.

[27] I also note that the School District states that it is still prepared to provide access to the applicant at the school board offices: School District's initial submissions at para.11.

[28] See Order F08-12, 2008 CanLII 30214 at paras. 73 and 74.

[29] I note that s. 22(2)(a) does not apply to the information about the police officer because the RCMP is not a "public body" as defined by FIPPA. However, the fact that disclosure is desirable

Section 22(2)(c)

[47] Section 22(2)(c) is a factor in favour of disclosure where the personal information is relevant to a fair determination of the applicant's rights.

[48] The applicant submits the footage is relevant to a fair determination of her son's rights to a fair education, including proper care and treatment within the public education system. My understanding is that the applicant believes the School District did not adequately accommodate the child, and that this lack of accommodation may be a breach of the *Charter*. The applicant states that her son experienced extreme mental anguish from how School District employees handled him, and she wants to ensure that the recordings are retained until after the time for commencing legal action against the School District expires under the *Limitation Act*, which the applicant says is after the child turns 19 years old.

[49] The School District noted in reply that the applicant's argument is in relation to "possible future civil litigation", and it submits that Russell J. in *Stelmack*[30] appears to have questioned the validity of relying on s. 22(2)(c) given the broad disclosure available in civil proceedings.

[50] Previous orders have held that s. 22(2)(c) only applies if all of the following circumstances are met:

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.
4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.[31]

[51] Starting with part 2 of the above test, no proceedings are underway in this case, so the question turns to whether a proceeding is "contemplated". On this point, Adjudicator Fedorak stated in Order F12-08 that:

> Section 22(2)(c) clearly applies to existing legal proceedings, and it has been interpreted so as to apply to contemplated proceedings. It seems to me,

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for subjecting police interactions with the public to public scrutiny is a similar, non-enumerated factor under s. 22(2) that I consider to be relevant.

[30] *British Columbia (Ministry of Public Safety and Solicitor General) v. Stelmack*, 2011 BCSC 1244

[31] Order 01-07, 2001 CanLII 21561 at para. 31 citing Ontario Order P-651, [1994] O.I.P.C. No. 104.

> however, that "contemplated proceedings" must necessarily refer to situations where a decision has been made to commence legal proceedings, even where they have not yet been formally initiated. In the absence of such a limitation, s. 22(2)(c) would be too open-ended—it would mean that any time any incident took place that caused someone to *consider* commencing legal proceedings, s. 22(2)(c) would apply.[32] [emphasis in original]

[52] There is no evidence in this case that a decision has been made to commence proceedings. Further, I am not satisfied on the facts of this case, including the contents of the footage that is at issue, that proceedings are "contemplated" just because the applicant speculates that the child may want to consider claiming against the School District when he turns 19. Therefore, I find that part 2 of the test for s. 22(2)(c) has not been met.

[53] Further, the applicant does not explain how the video footage would have some bearing on, or significance for, determining a specified legal right, or why it is necessary in order to prepare for or ensure a fair hearing. Moreover, it is not apparent to me that the unsevered footage would have some bearing on, or significance for, determination of a claim regardless of whether it is by the applicant for the child or the child when he becomes an adult. I therefore find that parts 3 and 4 of the test are also not met.

[54] For the above reasons, I find that s. 22(2)(c) is not a factor in favour of disclosure in this case.

Section 22(2)(h)

[55] Section 22(2)(h) favours a finding that disclosure would be an unreasonable invasion of personal privacy if the disclosure may unfairly damage the reputation of any person referred to in the records requested by the applicant.

[56] The School District's concern in this case is that the applicant will edit and publicize the footage to impugn the third parties. The School District submits that s. 22(2)(h) should be given heavy weight in this inquiry. It submits releasing the unsevered recordings to the applicant would expose the teacher and youth worker to unfair attacks on their conduct and professionalism. For this reason, the School District submits that any recordings released must be severed in order to prevent the identification of the third parties, including facial images or voices and any use of their names by the child. No such concerns are identified with respect to the RCMP officer.

[57] In the School District's view, the applicant has previously posted inaccurate accounts on social media about interactions that have occurred between her children and school staff. It states that the professional integrity of

[32] Order F12-08, 2012 BCIPC 12 (CanLII) at para. 29.

School District employees has been questioned publicly and without merit on numerous occasions by the applicant and her husband on the basis of distorted evidence, and it provides specific examples of its concerns. Based on this, the School District believes that the applicant may post edited and/or editorialized versions of the video footage in a matter designed to impugn the teacher and youth worker, and to blame them for the behaviour of her child.

[58] The applicant states that she and her husband have no intention of posting the recordings, in whole or part, on social media. She states that her reason for requesting the footage was to provide it to the child's medical team at BC Children's Hospital, in hopes that it would give them valuable input and insight into how to best help the child in a school setting.[33] She points out that she and her husband still have two children enrolled in the School District, and that they have not discussed any further issues on any social media site. She submits that there are no longer any reasonable grounds to believe that they will post information, since the last post made to social media with reference to the School District or its staff was in June 2013. The applicant submits that she is requesting the records to ensure their survival for future proceedings, to review the records with medical specialists, and to defend the child against damage to his reputation and the unjust label that the School District has placed on him as a violent student with severe behaviours.

[59] In my view, there is a risk that the applicant or her husband will use the video footage to attempt to attack the conduct or professionalism of the teacher and youth worker. The applicant believes School District staff are improperly trained, or are improperly accommodating, the child. Further, the applicant and her husband have previously edited and editorialized records received from the School District to impugn School District employees in relation to the child's education. Moreover, this dispute between the applicant and the School District regarding the child's time in the ESP program is not an isolated incident, as there are a number of issues the applicant has had with the School District regarding her children. Given the history between the parties, in my view there is a reasonable prospect that the applicant will have a dispute with School District that may lead to the applicant or her husband making an edited or editorialized version of the footage public.

[60] While rare, there have been cases involving video records where the possibility of records being taken out of context if disclosed publicly has been considered to be a relevant factor.[34] For example, in Alberta Order F2008-020[35]

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[33] Applicant's reply submissions at p. 13.

[34] The possibility that information could be taken "out of context" and result in unfair harm to someone's reputation has usually not been found to be sufficient reason to withhold information. For example, see Order F10-06, 2010 BCIPC 9 (CanLII) at para. 129 with respect to s. 21 of FIPPA.

[35] Alberta Order F2008-020, [2009] A.I.P.C.D. No. 8.

the adjudicator determined that disclosure of video footage of a police incident may unfairly damage the reputations of the police officers involved, in part because the video did not have contextual information about the alleged wrongdoing. The adjudicator also concluded that the physical images of the officers were more private and intimate than any similar personal information about them would be in a written report.

[61] In contrast to Alberta Order F2008-020, the footage at issue here is not controversial. It is mostly hours of footage in which the third parties are teaching the child, as well as footage of the child having an emotional outburst. However, like Alberta Order F2008-020, in my view this is a rare case where the prospect of information being taken out of context and distributed publicly may cause harm to a third party, and it is a relevant consideration under s. 22(2)(h). The factors in this case that lead me to this conclusion are that: the information is video footage rather than a written record; there are vast quantities of footage to draw from and edit since it is 10 days of classroom footage from multiple camera angles; the applicant is seeking this information for her and her child's private interest (as opposed to a journalist or someone else seeking the information for a more public interest); the applicant is consistently critical of third parties who work for the School District regarding how they interact with and treat her children; and the applicant has a history of posting edited and editorialized materials on the internet in a manner that is designed to unfairly criticize the School District and its employees who interact with the child.

[62] For the above reasons, given the facts of this case, I find that s. 22(2)(h) favours a finding that disclosure would be an unreasonable invasion of personal privacy because disclosure may unfairly damage the reputation of the teacher and youth worker. However, I do not give this factor "heavy weight", as submitted by the School District. Further, s. 22(2)(h) does not apply with respect to the RCMP officer because the information about the RCMP officer is limited and innocuous, the applicant already has the RCMP officer's notes (including his identity) regarding his account of and opinions regarding his involvement, and because there is no reason to believe that the applicant will attempt to use the information to attempt to unfairly damage his reputation.

Other Factors

Applicant's knowledge and the purpose of the record

[63] Public bodies are required to consider all relevant circumstances in determining whether disclosure would be unreasonable invasion of a third party's personal privacy, including those not enumerated in s. 22(2).

[64] The record is video footage in a classroom setting, which is unusual for a School District classroom.[36] As the School District explains, the cameras were intended to create a clear record of the child's time at the school for its staff to review with the child and the applicant if the child had an emotional outburst. The teacher and youth worker knew they were being recorded and that the footage may be viewed in the event of an incident. However, the School District had tight controls to strictly limit who had access to the footage, and it did not disseminate it.[37] The contemplated use of the footage was for School District staff to view it with the applicant and child in the event of an incident. I find that this purpose in the context of a school setting makes it unlikely that a reasonable person would have contemplated the release of copies of the footage.

[65] In previous orders, it has been determined that knowledge of the personal information at issue favours disclosure of the information. Further, as the applicant points out, the fact that the teacher and youth worker knew that the footage might be viewed by the applicant in the event the child had a behavioural incident also arguably favours a finding that disclosure would not be an unreasonable invasion of their personal privacy.

[66] In this case, the applicant clearly knows the identities of the teacher and youth worker. Further, with respect to the other personal information conveyed by the recordings, even though the applicant was only present for a small portion of the time in the classroom, she knows the information because the School District has provided her with access to view the recording.[38]

[67] In this case, I find the fact that the applicant already knows the identities of third parties favours disclosure of the recordings to the applicant. This factor is particularly strong for the RCMP officer, as the RCMP has already disclosed records to the applicant that disclose the officer's identity.

[68] In my view, the fact that the teacher and youth worker knew that the applicant may view the recordings in the event the child had a behavioural incident – and that such an incident occurred – supports a finding that it would not be an unreasonable invasion of their personal privacy for the applicant to have access to this information. However, this is tempered for the teacher and youth worker by the fact that access to the footage was strictly limited,[39] and I find that there was an expectation that it would not be disseminated. I therefore give this factor less weight than I otherwise would because although there was an expectation that the applicant would have access to view the footage, there was also an expectation that it would not be provided or disseminated.

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[36] The School District's initial submissions at para. 26, et. al.
[37] Affidavit #1 of the School District school operations officer who is also the freedom of information & protection of privacy contact ("School Operations Officer") at para. 5.
[38] The applicant has only seen portions of the footage to date.
[39] For example, affidavit of the School Operations Officer at para. 5.

Access to the Video Footage is Limited

[69] The applicant submits that the access to the footage the School District has provided her has been limited and restrictive, and that a "heavy weight" should be given to this fact.[40] She submits that the School District has and will continue to make it difficult for her to receive access to the footage (which she says is contrary to the School District's obligations under FIPPA), and that the way to remove this barrier is for her to be provided with an unsevered copy of the video footage. Further, the applicant submits that it is difficult to attend the board office during the times made available, as the applicant and her husband are required to miss work or get a babysitter in order to access this information. In effect, the applicant argues that there is a strong factor in favour of disclosure of a copy of the unsevered video footage under s. 22 (as opposed to merely receiving access to the unsevered footage) because the School District is unfairly restricting access to the footage and it is costly for her arrange for such access.

[70] I accept that it would be more convenient to the applicant for her to have a copy of the unsevered footage rather than to only have access to it at the School District offices. However, I do not agree that the access the School District has provided her is unreasonably restrictive,[41] or that there is a strong factor in favour of disclosure to the applicant because she does not have unfettered access to the unsevered footage.

[71] The applicant also submits that a factor favouring disclosure of the unsevered footage is that disclosure will enable expert medical professionals to give their opinions about the accommodations that were made for the child, as well as to provide insight about what strategies the teacher and youth worker took with the child that may be working or what may work better. She submits that the School District's solution of only providing access at the School District office means that medical professionals and members of the child's medical team must meet restricted viewing schedules at the school board office, and that this is not a realistic option.

[72] The applicant did not provide evidence from any medical professionals stating that the video footage may assist them in treating the child, or that they have had problems accessing the footage due to limitations to access put in

[40] Applicant's reply submissions at p. 21.

[41] In my view, the documentary evidence provided by the applicant undermines her argument. The School District initially provided a stated time to view the footage. The applicant did not attend or attempt to reschedule. The School District then sent a follow-up letter, asking her to contact the School District as soon as possible if the applicant still wished to view the video. Six days later, on a Monday, the applicant requested to view the footage at the soonest time that was available. Thirty minutes later, the School District's Operations Officer provided the following times: Tuesday at 9:00 a.m. to 12:00 p.m.; Wednesday at 9:00 a.m. to 12:00 p.m. and 1:00 p.m. to 3:30 p.m.; Thursday at 9:00 a.m. to 12:00 p.m.; and Friday after 1:00 p.m.: Applicant's reply submissions at Exhibits "N" and "O".

place by the School District. Absent this evidence, I have significant doubts that there is much – if any – medical value in the withheld information that is now 2 years old. Moreover, even if I am wrong about this potential use of the footage, I would expect that the School District and medical professionals could reach terms or an arrangement for disclosure of this information to such medical professionals for the purpose of providing medical treatment to the child.[42] Based on the materials before me, I am not persuaded that the School District has limited access of the footage to medical professionals who wanted the information for the purpose of providing medical care to the child. However, even if this were the case, the fact that the School District is providing access to the footage at its office diminishes this from being a factor in favour of disclosure.

[73] For the above reasons, I find the applicant's submission that the footage should be disclosed because viewing access is insufficient does not significantly favour disclosure in these circumstances under s. 22(2).

Section 22(1) – *Would disclosure be an unreasonable invasion of personal privacy?*

[74] Section 22(1) requires a determination of whether disclosure to the applicant would be an unreasonable invasion of a third party's personal privacy. To summarize, the records in dispute contain personal information and s. 22(4) does not apply. There is also a presumption that disclosure of the withheld information would be an unreasonable invasion of personal privacy because it relates to the employment histories of third parties under s. 22(3)(d).

[75] This case is unusual in that some of the reasoning that is relevant in deciding whether disclosure of a copy of the video footage to the applicant would be an unreasonable invasion of the personal privacy of the third parties does not apply to prevent the applicant from receiving access by viewing the recording.

[76] FIPPA provides me with the authority to address this distinction, as s. 58(4) of FIPPA states that "[t]he commissioner may specify any terms or conditions in an order made under this section". Therefore, as the Commissioner's delegate in this case, I have discretion in what to order.

[77] I will first address the issue of disclosing a copy of the video recording, and then briefly address access.

[42] It may be the case that the School District may be authorized to make such a disclosure under s. 33.2(a) or another provision of FIPPA.

Disclosure of a Copy of the Recording

[78] For information about the teacher and the youth worker, s. 22(2)(a) is a factor that favours rebutting the presumption that disclosure would be an unreasonable invasion of their personal privacy because it is desirable for the purpose of subjecting the activities of the School District to public scrutiny. However, this is not a significant factor in this case in light of the fact that the School District has provided access to the applicant by permitting her to view the recordings. Further, the fact that the applicant already knows the identities of the teacher and youth worker – as well as the contents of portions of the record – is a factor that favours disclosure. However, s. 22(2)(h) regarding disclosure that may unfairly damage a person's reputation supports withholding the information due to the prospect that the applicant may disseminate edited and editorialized versions of the video footage.

[79] There is a presumption that disclosure of the personal information of the teacher and youth worker would be an unreasonable invasion of their personal privacy under s. 22(3)(d). After considering all of the relevant circumstances in relation to their personal information, I find that the factors in favour of disclosure are not sufficient to rebut the presumption that disclosure would be unreasonable invasion of their personal privacy. I therefore find that the School District is required to withhold the video footage under s. 22 because disclosure would be an unreasonable invasion of the personal privacy of these third parties.

[80] For information about the RCMP officer, there is also a presumption that disclosure would be an unreasonable invasion of his personal privacy. However, disclosure is desirable for the purpose of subjecting the activities of the RCMP to public scrutiny because it is an interaction between a police officer and the public, although this is not a significant factor in this case. This is, in part, because the information about the RCMP officer is innocuous information that is limited in scope. Further, the applicant already knows the identity of the RCMP officer because he was in the classroom with the applicant and because the RCMP has provided the applicant with the officer's report (which includes the officer's identity) with respect to his involvement. This also weighs in favour of disclosure. Further, unlike with the teacher and youth worker, there is nothing to suggest that the applicant will attempt to impugn the conduct of the RCMP officer if she has a copy of this personal information. After considering of all the relevant circumstances in this case, I find that that the presumption that disclosure of the personal information of the RCMP officer has been rebutted and that s. 22 does not apply to it.

Access

[81] It is rare for orders in this or other jurisdictions to determine that an applicant is not entitled to receive a record, but that he or she is nonetheless

entitled to have access to view the record. However, there are exceptions. For example, Alberta Order F2015-02 related in part to CCTV footage about the use of force by correctional officers against a named individual at a remand centre. In that case, it was determined that disclosure of the footage to the applicant would be an unreasonable invasion of the personal privacy of third parties, but that the applicant and/or his legal counsel could examine the footage at the public body's premises.[43]

[82] In this case, the School District is not alleging that enabling the applicant and her husband to view the recordings at the School District office would unreasonably invade the personal privacy of the teacher and the youth worker. For the reasons discussed above, including that there would not be harm within the meaning of s. 22(2)(h) for this type of access and that the teacher and youth worker knew that the applicant may receive access to view the footage for a similar purpose, I find that permitting the applicant and her husband to view the recordings at the School District office would not be an unreasonable invasion of the personal privacy of the teacher or the youth worker.

[83] The applicant's submissions state that some of the reasons she is seeking the footage is with respect to medical treatment for the child, and for possible litigation in relation to the child's education. She states that doctors treating the child should have an opportunity to review the unsevered recording, and she opines that the footage may relate to a legal claim against the School District. These submissions are with respect to receiving a copy of the recording,[44] but I will also consider them in relation to access.

[84] In my view, for the same reasons that the applicant and her husband are entitled to view the recordings, it would not be an unreasonable invasion of the personal privacy of the teacher or youth worker for medical professionals to review the unsevered recording for the purpose of treating the child. This purpose, similar to the purpose for which the video footage was first created, is to access the information to attempt to find out information about the child's behaviours for the benefit of the child. Further, even though the pertinence of viewing the footage for the purpose of determining legal liability is not apparent to me, I also find that it would not be an unreasonable invasion of the personal privacy of the teacher and youth worker for a lawyer of the applicant or the child to view the recordings for the purpose of providing legal advice.

Severing

[85] I have determined that it would be an unreasonable invasion of the personal privacy of the teacher and youth worker to provide the applicant with

[43] Alberta Order F2015-02, 2015 CanLII 4586 (AB OIPC) at para. 74.
[44] The School District does not address the issue of access for the child's medical or legal representatives.

a copy of the recording containing their personal information, and that it would not be an unreasonable invasion of the personal privacy of the RCMP officer. I have also determined that the applicant, and medical and legal professionals, can receive access by viewing the unsevered recording.

[86] As addressed above with respect to ss. 22(4)(e) and 22(3)(d), in my view severing the third parties' faces while disclosing their bodies or voices would enable others to identify the teacher and youth worker. In other words, in this case, only obscuring the faces would nearly amount to complete disclosure. Further, this is not a case where the movements or actions of the third parties are of a nature that is desirable to disclose them for the purpose of providing public scrutiny (*i.e.* as may be the case for an assault, etc.). Therefore, for clarity, my finding that s. 22 applies to the personal information of the teacher and youth worker applies to their faces, bodies and voices.

[87] The video footage is from four different cameras that ran simultaneously from different angles in the classroom. The applicant states that viewing the different angles of the unsevered video footage when they are not in sync makes them "unintelligible", so I take it that she would perceive there to be even less use or value in attempting to view unsynced footage where the voices and other personal information of the teacher and youth worker are severed. This severed footage would show the child's behavioural incident and the RCMP officer attending the classroom, but not those portions of the footage that the applicant seeks.[45] The information that would be left after severing the personal information of the teacher and youth worker would be more than meaningless snippets, but it would be stripped of the detail of the interactions between the teacher, youth worker and child that are the reason for the applicant's access request.

[88] The School District submits that it will be expensive and time intensive to sever the recording, but that it has found a service provider who is capable of editing the recordings to mask the faces and voices of third parties. It states that it will have the severing of the teacher and youth worker completed and provide the applicant with severed footage if its position is upheld.

[89] The recordings contain many hours of footage, as it is the footage from four different cameras over a 10 day period. The School District did not provide specific time and cost estimates for severing this information, but I accept that this process will be time intensive and costly.

[90] In this case, I have already found that the applicant has a right of access to the unsevered recordings by being entitled to view them. Given this, combined with the costs to complete the severing and the fact that the severed

[45] I note that the applicant already has notes of this from the RCMP.

video will not be of utility to the applicant, I find that the School District is not required to provide a copy of the severed recordings to the applicant.

CONCLUSION

[91] Therefore, for the reasons given above, under s. 58 of FIPPA I order that:

a) the School District is required to refuse to give the applicant the recording containing the personal information of the teacher and youth worker pursuant to s. 22 of FIPPA. Further, the School District is not required to sever the recordings or provide a copy of the severed recordings to the applicant; and

b) the School District is required to give the applicant reasonable access to the recordings by permitting the applicant and/or her husband to view the unsevered recordings at the School District's office, pursuant to s. 58(4) of FIPPA. Further, the School District is also required to give access to the recordings to the child's medical professional(s) to review the unsevered recordings for the purpose of treating the child, and to the applicant's or child's lawyer for the purpose of providing legal advice, either at the School District's office or by another method of access that ensures that the recordings will not be disseminated.

August 21, 2015

ORIGINAL SIGNED BY

Ross Alexander, Adjudicator

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