



OFFICE OF THE
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Order F15-50

CITY OF WILLIAMS LAKE

Hamish Flanagan
Adjudicator

September 23, 2015

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Summary: The applicant requested correspondence about himself from the City of Williams Lake. The City disclosed most of the responsive information except for information that identified a third party who had written a series of emails about the applicant to the City. The information was withheld on the basis that disclosure would be an unreasonable invasion of the third party's personal privacy under s. 22 of FIPPA. The City was required to continue withhold the identifying information under s. 22.

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

Authorities Considered: Order 01-53, 2001 CanLII 21607 (BC IPC); Order F14-38, 2014 BCIPC 41 (CanLII); Order F13-13, 2013 BCIPC 16 (CanLII); Order 01-07, 2001 CanLII 21561 (BC IPC); Order F15-11, 2015 BCIPC 11 (CanLII); Order F05-31, 2005 CanLII 39585 (BC IPC); Decision F10-10, 2010 BCIPC 49 (CanLII); Order 00-18, 2000 CanLII 7416 (BC IPC); Decision F08-06, 2008 CanLII 41154 (BC IPC); Order F14-17, 2014 BCIPC 20 (CanLII); Order No. 36-1995, [1995] B.C.I.P.C.D. No. 8; Order No. 76-1996, 1996 CanLII 732 (BC IPC); Order F10-10, 2010 BCIPC 17 (CanLII); Order F06-11, 2006 CanLII 25571 (BC IPC); Order F08-08, 2008 CanLII 21700 (BC IPC); Order F14-47, 2014 BCIPC 41 (CanLII); Order F15-29, 2015 BCIPC 32 (CanLII).

Cases Considered: *Kenney v. Loewen*, 1999 CanLII 6110 (BCSC); *Irwin Toy Ltd. v. Doe*, (2000), 12 C.P.C. (5th) 103 (Ont. Sup. Ct.); *Norwich Pharmacal Co. v. Commissioners of Customs and Excise*, [1974] A.C. 133 (H.L.); *J. Doe v. British Columbia (Information and Privacy Commissioner)*, [1996] B.C.J. No. 1950.

INTRODUCTION

[1] The applicant requested correspondence about himself held by the City of Williams Lake (“City”). The City disclosed information to him in response to his request but withheld some information on the basis that disclosure would be an unreasonable invasion of a third party’s personal privacy under s. 22 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[2] The applicant requested the Office of the Information and Privacy Commissioner (“OIPC”) review the City’s response. The City disclosed some additional information during OIPC mediation but continued to withhold identifying information about the third party. This did not satisfy the applicant who requested that the matter proceed to an inquiry.

ISSUE

[3] The issue in this inquiry is whether the City is required to refuse to disclose information because disclosure would be an unreasonable invasion of a third party’s personal privacy pursuant to s. 22 of FIPPA.

[4] Section 57(2) of FIPPA places the burden of proof on the applicant to establish that disclosure of personal information would not be an unreasonable invasion of a third party’s personal privacy under s. 22 of FIPPA.

DISCUSSION

[5] **Background**— The applicant was the successful applicant in a competition for a senior management position with the City. However, the City decided not to employ the applicant and advised him accordingly. The applicant is involved in litigation with the City arising from its decision not to employ him.

[6] Several months after the City decided not to employ the applicant, the third party telephoned a City employee for advice on how to send the City some information about the applicant. The City employee provided her email address, and the third party sent the employee a series of emails which included various attachments. The City says its employee did not respond to the emails and had no further contact with the third party. It also says that the employee reviewed the emails and determined they were of no interest to the City. The applicant seeks the third party’s identifying information because he wishes to pursue civil action against the third party.

[7] **Records**—The withheld information comprises the third party’s name, phone number and email addresses (“identifying information”) contained in four emails sent to the City. The remainder of the emails and the attachments to the

emails, which contain information about the applicant's professional and business affairs, have been disclosed to the applicant.

[8] **Disclosure Harmful to Personal Privacy**— Section 22(1) states:

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.

[9] Numerous orders have considered the proper approach to s. 22.¹ The public body must first determine if the information in dispute is personal information, because s. 22 only applies to “personal information” of third parties as defined by FIPPA. If so, the public body must consider whether the information meets the criteria identified in s. 22(4). If s. 22(4) applies, s. 22 does not require the public body to refuse to disclose the information. If s. 22(4) does not apply, the public body must determine whether disclosure of the information falls within s. 22(3). If s. 22(3) applies, disclosure is presumed to be an unreasonable invasion of third party privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information at issue would be an unreasonable invasion of a third party's personal privacy.

Personal Information

[10] The term personal information under FIPPA means “recorded information about an identifiable individual other than contact information”.² 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;

[11] The City says the withheld information is personal information because it is identifying information about the third party and that it is not contact information.

[12] The applicant accepts that the identifying information identifies the third party and by inference that it is the third party's personal information. However, the applicant says that the identifying information is also his personal information. He cites Order F06-11,³ in support of his submission that the identity of an opinion-giver is part of the personal information of the individual about whom the opinions are expressed.

¹ See for example Order 01-53, 2001 CanLII 21607 (BC IPC) at paras. 22-24.

² Definitions are in Schedule 1 of FIPPA.

³ 2006 CanLII 25571 (BC IPC), cited with approval in Order F10-10, 2010 BCIPC 17 (CanLII).

[13] The City disputes that the third party's identifying information is the applicant's personal information. The City says that Order F06-11 differs from the present case for several reasons. Specifically, the information at issue does not involve any "intertwined" information of the third party and the applicant, and the information is strictly about the third party.⁴ The City notes also that in Order F06-11 the applicant knew the identity of the complainant,⁵ which is not the case here.

[14] In Order F06-11 the adjudicator found the identity of the opinion-giver was an essential part of the opinion about the individual whom the opinions were expressed.⁶ That is not the case here, however. There is nothing to suggest that the third party's identity is an essential part of any opinion about the applicant contained in the information the third party supplied to the City. The third party is a member of the public who relayed factual information to the City, interspersed with the third party's speculation and thoughts about what it means. I note there is no evidence that the City treated the applicant's information any differently due to who the third party was, which suggests that their identity was not an essential part of the information they provided, nor is necessary in order to understand the significance of the information.

[15] Given that the identity of the third party is not an essential part of the information provided to the City, and that the third party identifying information is not about the applicant, I conclude that the identifying information is not the personal information of the applicant.

[16] Although it appears that the identifying information includes a business telephone number and business email address, it is not "contact information" as defined in Schedule 1 of the Act in this context. It is clear that the third party is not communicating in their work or professional capacity, and the subject of the emails is a personal matter unrelated to their business.⁷ In conclusion, I find that the identifying information is the personal information of the third party.⁸

Section 22(4) and s. 22(3)

[17] Neither party refers to s. 22(4) or s. 22(3) as relevant and I agree there are no provisions in s. 22(4) or s. 22(3) relevant to the identifying information.

⁴ City reply submission at para. 10.

⁵ See para. 55

⁶ See paras. 41 and 78.

⁷ See Order F14-38, 2014 BCIPC 41 (CanLII) at para. 19 for a similar finding.

⁸ See Order F13-13, 2013 BCIPC 16 (CanLII) at para. 18 for a similar finding.

Other factors including s. 22(2)

[18] Section 22(2) states in part:

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,

...

[19] The applicant says s. 22(2)(c) is applicable and it is not unreasonable to disclose the identifying information because it is relevant to a fair determination of the applicant's rights. The City says that s. 22(2)(f) is relevant because the information was supplied in confidence by the third party.

[20] Both parties say that the provision relied on by the other party is not relevant. The applicant says s. 22(2)(f) does not apply because the third party's emails were motivated by malicious intent. The public body say the applicant does not satisfy all of the requirements previous Orders establish are required for s. 22(2)(c) to apply.

Section 22(2)(c)

[21] Previous orders have said that all four parts of the following test must be met in order for s. 22(2)(c) to apply:⁹

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

⁹ For example, see Order 01-07, 2001 CanLII 21561 (BC IPC) and Order F15-11, 2015 BCIPC 11 (CanLII).

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

[22] The applicant says that he requires the personal contact information to commence legal proceedings against the third party for defamation of character and invasion of privacy (a tort under the *Privacy Act*). He says that without knowing the identity of the third party he cannot commence the action he proposes, so is prevented from obtaining a fair determination of his right to seek redress for defamation or breach of privacy by the third party.

[23] The City accepts that the legal actions the applicant refers to are recognized legal rights that satisfy the first element of the test.¹⁰ However, the City says that the applicant has merely asserted that he is contemplating legal action, without any proof, so the second element has not been met. The City cites Order F05-31, where the Adjudicator observed that the applicant had not provided any proof that it was contemplating suing and that more is necessary to fulfil the second part of the test than merely asserting that one is contemplating suing.¹¹

[24] I recognise the City's concern about a lack of concrete steps by the applicant to initiate legal action. However, in Order F15-33¹² the applicant's pursuit of a matter through to an OIPC inquiry was accepted as some evidence of the seriousness with which legal action was contemplated. So too here, the applicant has pursued the information at issue to this inquiry out of a belief that he needs it to bring a proceeding. I accept this as some indication of a commitment to pursue that proceeding. Further, the City does not suggest other steps the applicant could have taken to demonstrate that he is seriously contemplating legal action, and none are immediately apparent to me. The facts differ from Order F05-31, cited by the City, where the adjudicator noted the applicant Union could have indicated its resolve to sue by passing a formal resolution. The applicant's belief that he needs the information in order to bring the contemplated proceeding, combined with his pursuit of the information to this inquiry, satisfies me that the second element of the test is met.

[25] The City also asserts, without further elaboration, that the third element for s. 22(2)(c) is not met because the identifying information has no bearing on the determination of the applicant's rights. Given my finding in relation to the fourth element of the test, however, I do not need to discuss the third element further.

[26] The City submits that the fourth element of the test is not met because the information is not necessary in order to prepare for the proceeding or to ensure a fair hearing. The applicant says that the information is necessary because he is

¹⁰ City reply submission at para. 5.

¹¹ 2005 CanLII 39585 (BC IPC) at para. 48.

¹² At para. 88.

contemplating bringing a civil action for defamation and under the *Privacy Act* against the third party. The City cites Order F05-31 for the proposition that it is not necessary to know the identity of a third party to commence an action for defamation:

In any case, independent of the above, the IUOE has not shown that it needs the personal information in order to start an action for defamation, making that information relevant to a fair determination of rights. I say this because, even accepting for discussion purposes that IUOE Local 963 has a cause of action for defamation in its own right, the IUOE does not need to know the identity of the third party to begin such a lawsuit. A defamation action can be started against unidentified defendants, in a so-called John Doe action. A plaintiff can then seek a court order for disclosure of information in the hands of third parties, for the purpose of discovering the identity of the person responsible for the defamation. This is clear, as regards defamation actions, from *Kenney v. Loewen* and *Irwin Toy Ltd. v. Doe*.¹³

[27] The availability in BC of the action referred to in Order F05-31, known as a *Norwich Pharmacal Order*¹⁴ or an Equitable Bill of Discovery was confirmed in *Kenney v. Loewen*. I note that the BC Supreme Court Civil Rules also provide a mechanism for obtaining identifying information necessary for an action, including an action for defamation.¹⁵

[28] I am satisfied that the identifying information is not necessary for a fair determination of the applicant's rights. If the applicant brings the proceeding he contemplates, his rights will be determined by the courts. As set out above, the courts in BC have made provision for an individual to obtain the necessary identifying information to obtain a fair determination of his or her rights. Therefore, disclosure of the identifying information is not *necessary* for the applicant to obtain a fair determination of his rights. Thus, the fourth requirement for s. 22(2)(c) test does not exist. Section 22(2)(c) is therefore not a factor in favour of disclosure of the information.

Section 22(2)(f)

[29] Section 22(2)(f) requires consideration of whether the personal information was supplied in confidence when determining whether disclosure would be an unreasonable invasion of personal privacy.

¹³ Order F05-31 at para. 50, citing *Kenney v. Loewen*, 1999 CanLII 6110 (BCSC) and *Irwin Toy Ltd. v. Doe*, (2000), 12 C.P.C. (5th) 103 (Ont. Sup. Ct.).

¹⁴ After the UK case *Norwich Pharmacal Co. v. Commissioners of Customs and Excise*, [1974] A.C. 133 (H.L.).

¹⁵ See the discussion of this method in The Continuing Legal Education Society of BC's 2010 publication *The Modern-Day Soapbox: Defamation in the Age of the Internet* at <https://www.cle.bc.ca/PracticePoints/LIT/11-ModernSoapbox.pdf>.

[30] The City says that the identifying information was explicitly supplied in confidence within the meaning of s. 22(2)(f), and that this strongly weighs in favour of withholding the identifying information.

[31] It is very clear from the records that confidentiality was imperative to the third party. The third party explicitly and repeatedly stresses confidentiality in the emails. Although the applicant argues that this desire for confidentiality extended only to the information shared and not to the applicant's identity, that is clearly not the case as is evident from a review of the records. The third party's primary concern is not about sharing the information, but about being identified as the source of the information. Section 22(2)(f) is therefore a strong factor in favour of withholding the identifying information.

Other Relevant Factors

Previous Orders

[32] Both parties identify decisions and orders of this office in support of their respective position regarding disclosure of the identifying information.¹⁶ I have considered the cases they mention. The cases that the applicant raises differed factually or were overturned on judicial review,¹⁷ so are not persuasive.

[33] To summarize the position regarding complainant's identities, since *Doe*, orders of this office have generally determined that public bodies are required to withhold complainant names and information identifying a complainant under s. 22.¹⁸ Decision F10-10 is particularly persuasive.¹⁹ In that decision, Adjudicator McEvoy considered several orders²⁰ before deciding that it was plain and obvious that disclosure of identifying information about a complainant was an unreasonable invasion of personal privacy, even without the added weight of a s. 22(3) presumption that disclosure would be unreasonable invasion of personal privacy.²¹ I note that I have used the term complainant here because that is used in Decision F10-10. I see no reason to distinguish between the

¹⁶ Order No. 36-1995, [1995] B.C.I.P.C.D. No. 8; Order No. 76-1996, 1996 CanLII 732 (BC IPC); Order F10-10, 2010 BCIPC 17 (CanLII); Order F06-11, 2006 CanLII 25571 (BC IPC); Order F08-08, 2008 CanLII 21700 (BC IPC); Order F14-38, 2014 BCIPC 41 (CanLII); Order F14-17, 2014 BCIPC 20 (CanLII); *J. Doe v. British Columbia (Information and Privacy Commissioner)* [1996] B.C.J. No. 1950; Decision F10-10, 2010 BCIPC 49 (CanLII). I also considered Order F15-29, 2015 BCIPC 32 (CanLII), decided after the parties submissions for this inquiry.

¹⁷ Order No. 36-1995, [1995] B.C.I.P.C.D. No. 8; Order No. 76-1996, 1996 CanLII 732 (BC IPC) (which relies on the analysis in No. 36-1995). Order No. 36-1995 was quashed on judicial review in *J. Doe v. British Columbia (Information and Privacy Commissioner)* [1996] B.C.J. No. 1950.

¹⁸ For a similar conclusion see Order F14-17, 2014 BCIPC 20 (CanLII) at para. 76

¹⁹ 2010 BCIPC 49 (CanLII).

²⁰ Including Order 00-18, 2000 CanLII 7416 (BC IPC) and Decision F08-06, 2008 CanLII 41154 (BC IPC).

²¹ Also see Order 00-18 in support of the same proposition.

treatment of complainants, and those like the third party in issue here, whose role is more accurately characterized as an informant.

Malicious intent and s 22(2) factors affecting the applicant

[34] The applicant asserts that the third party acted with malicious intent in sending information about him to the City and that this should undermine any right to confidentiality the third party might have. The City says that there is no evidence the third party acted with malicious intent. The evidence before me, including the records, does not reveal a clear motive for the third party's emails to the City. The records and evidence do not support the applicant's assertion about malicious intent.

[35] The applicant also submits that disclosure of the identifying information is necessary to protect him from the harms listed in s. 22(2) (i.e., unfair damage to his reputation, financial harm, and harm from disclosure of inaccurate or unreliable information).²² However, there is no evidence about how disclosure of the identifying information is necessary to prevent the possible harms in s. 22(2) occurring to the applicant.

Section 22(1)

[36] In this case, I find that disclosure of the identifying information would be an unreasonable invasion of personal privacy. Section 22(2)(f) strongly favours withholding the information. Section 22(2)(c) does not apply and there are no other factors in favour of disclosing the information. Previous orders of this office have consistently determined that public bodies are required to withhold identity information of complainants or informants under s. 22. I find that the City is required to withhold the identifying information under s. 22 of FIPPA.

CONCLUSION

[37] For the reasons given, under s. 58 of FIPPA, I order that the City is required to continue to refuse to disclose the information at issue it is withholding under s. 22 of FIPPA.

September 23, 2015

ORIGINAL SIGNED BY

Hamish Flanagan, Adjudicator

OIPC File No.: F14-56939

²² Subsections 22(2)(e), (f) and (g).