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Order F15-62

VANCOUVER POLICE DEPARTMENT

Caitlin Lemiski
Adjudicator

November 18, 2015

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Summary: The applicant requested records about an individual who died in 1989. The VPD withheld all of the requested information from responsive records on the basis that disclosure would be an unreasonable invasion of personal privacy (s. 22). Specifically, the VPD cited the presumption against disclosing personal information if the information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation (s. 22(3)(b)). The adjudicator determined that the VPD must refuse to disclose all of the requested information from the responsive records, except for the names and titles of employees who worked on the disputed records, because disclosing this information would not be an unreasonable invasion of personal privacy under s. 22(4)(e) of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* ss. 4(2), 22, 25.

Authorities Considered: B.C.: Order 27-1994, [2002] B.C.I.P.C.D. No. 26 (QL); Order 200-1997, 1997 CanLII 719 (BC IPC); Order 305-1999, 1999 CanLII 1817 (BC IPC); Order 01-53, 2001 CanLII 21607 (BC IPC); Order F05-24, CanLII 28523 (BC IPC); Order F07-04, 2007 CanLII 9595 (BC IPC); Order F09-19, 2009 CanLII 63567 (BC IPC); Order F12-08, 2012 BCIPC 12 (CanLII); Order F13-09, 2013 BCIPC 10 (CanLII); Order F13-12, 2013 BCIPC 15 (CanLII); Order F14-32, 2014 BCIPC 35 (CanLII); Order F15-42, 2015 BCIPC 45 (CanLII); Order F14-45, 2014 BCIPC 48 (CanLII); Order F14-56, 2014 BCIPC 60 (CanLII). **Ontario:** Order PO-1717, 1999 CanLII 14395 (ON IPC).

INTRODUCTION

[1] The applicant requested records related to investigations by the Vancouver Police Department ("VPD") of an individual before her death in 1989.[1] The VPD located responsive records but withheld them in their entirety under s. 22 (unreasonable invasion of personal privacy) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[2] The applicant was not satisfied with the VPD's response, and requested a review by the Office of the Information and Privacy Commissioner ("OIPC"). Mediation did not resolve all of the issues in dispute, and the matter proceeded to inquiry.

ISSUES

[3] The issue in this inquiry is whether the VPD must refuse to disclose personal information under s. 22(1) of FIPPA because disclosure would be an unreasonable invasion of personal privacy. Section 57(2) of FIPPA places the burden on the applicant to establish that disclosure of personal information contained in the requested records would not be an unreasonable invasion of personal privacy under s. 22 of FIPPA.[2]

DISCUSSION

[4] **Records at issue —**There are 42 pages of records in dispute. They consist of letters, polygraph test results, and reports.[3]

Procedural objections

[5] The applicant raises three procedural objections. First, he objects to the OIPC Fact Report, alleging it is incomplete.[4] The purpose of the Fact Report is to provide a summary of the agreed facts and to set out the issues in dispute which will be considered by the adjudicator at the inquiry.[5]

[6] The applicant attached a "side brief" with his submission in support of his objection to the Fact Report, however he does not say, and I cannot infer, what

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[1] The VPD does not indicate in its submissions when the deceased died. Newspaper articles submitted by the applicant report that the deceased died in 1989.

[2] I note that in his submissions, the applicant discusses other exceptions to disclosure under part 2 of FIPPA other than s. 22, as well as legal principles (such as privilege) that are not in dispute in this inquiry. I have not considered these exceptions and legal principles as they were not listed in the OIPC Fact Report and they are not in dispute.

[3] The OIPC Fact Report and the public body's submission at para. 2.

[4] Applicant's submission at para. 6.

[5] This information is in the Notice of Inquiry that the applicant received along with a copy of the Fact Report.

issue or fact he believes is missing. During the mediation process, the applicant and the VPD were presented with a draft version of the Fact Report and had the opportunity to discuss any objections with the OIPC investigator. For these reasons, I have therefore decided to proceed on the basis that the Fact Report before me is accurate and complete. The Fact Report states the VPD is withholding responsive records on the basis that s. 22 applies. The applicant has made submissions about the applicability of s. 22. This is the only section of FIPPA that the VPD has withheld information under, and it is the only issue before me for review.

[7] Second, the applicant alleges he experienced unspecified "unwarranted procedural delays" by the VPD.[6] He did not request to add these issues in his submissions or in the side brief. The timeliness or completeness of the VPD's response to the applicant's request was not included as an issue in the Fact Report, therefore it is not an issue that I have dealt with in this order.

[8] Third, the applicant has alleged that his ability to "give answer and defence" at this inquiry was reduced because of changes to the OIPC inquiry process that took effect between the time the inquiry was initially scheduled for 2014 and when the inquiry was actually held in 2015.[7] The OIPC changed its submission process for inquiries in 2015. Under the new process, the public body is expected to set out the reasons it is withholding information and the applicant is invited to respond. The public body may then reply to the applicant's response.[8] The applicant does not expressly say, but I infer that his objection is that this change in the OIPC process does not afford him the opportunity to fully present his case.

[9] The issue in dispute is whether s. 22 of FIPPA applies to the disputed information, and the applicant has made a submission on this issue. He has not pointed to any evidence that suggests that his right to be heard at this inquiry was impaired by the OIPC's procedural changes to the inquiry submission process. There is no indication of any additional evidence the applicant wished to present but did not. I find that the parties have had an adequate opportunity to be heard in this case, therefore I will not consider the applicant's objection to the inquiry submission process any further.

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[6] Applicant's submission at para. 6.

[7] The inquiry was rescheduled by the OIPC Registrar following a request to reschedule by the VPD. See the applicant's submission at p. 2 and the applicant's "side brief" at p. 2.

[8] Additional submissions may be made if requested and the OIPC considers further submissions merited. Under the old process, the applicant was invited to make both initial and reply submissions, but this changed in January 2015.

Public Interest Disclosure – s. 25

[10] The applicant alleges that ss. 25(1)(a) and (b) of FIPPA apply to his request.[9] This section of FIPPA 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 his request for a review to the OIPC, and this issue is not listed in the Notice of Inquiry or the Investigator's Fact Report. In my view, it would not be appropriate to add s. 25 as an issue at this late stage.[10]

[11] **Unreasonable invasion of personal privacy (s. 22)** — Section 22(1) requires public bodies to withhold information that would constitute an unreasonable invasion of personal privacy. In this case, the VPD withheld information about the deceased, as well as information about witnesses and possible suspects.[11]

[12] The approach to s. 22 has been established in previous orders.[12] The first step is to determine whether any of the disputed information is "personal information." Schedule 1 of FIPPA states that personal information "means recorded information about an identifiable individual other than contact information."[13] Schedule 1 of FIPPA states that contact information means "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."[14]

[13] The VPD submits that all of the disputed personal information is personal information about the deceased individual and other third parties (including witnesses and possible suspects), and that none of it contains the applicant's personal information.[15] The applicant does not question whether any of the disputed information is about him; however he questions generally whether all the disputed information is personal information and, specifically, whether anonymous correspondence is personal information. In support of his position, he refers to Order 01-53 which determined that some disputed information could

[9] Applicant's submission at paras. 48-50.
[10] The adjudicator in Order F15-42 2015 BCIPC 45 (CanLII) reached the same conclusion in that case when the applicant attempted to raise s. 25 after the Notice of Inquiry was issued.
[11] Public body's initial submission at paras. 8 and 15.
[12] For example, Order F13-09, 2013 BCIPC 10 (CanLII) at para. 18 and Order F12-08, 2012 BCIPC 12 (CanLII) at para. 12.
[13] Schedule 1 of FIPPA.
[14] Schedule 1 of FIPPA.
[15] Public body's initial submission at paras. 8 and 15.

not be withheld under s. 22(1) on the basis that it was "no one's personal information."[16]

[14] In regards to anonymous correspondence the applicant believes is in the disputed records, he submits:

> …Correspondence consisting of cut-and-paste words or images…is too abstract to meet an appreciable standard of privacy testing. Indeed these scandalize the sender and not the recipient. If the sender is anonymous and the content reveals no relevant details about the recipient the privacy concern is minimal….[17]

[15] Without revealing precisely what the disputed information is, I confirm that some of the information is correspondence that does not identify a sender or recipient. In the context in which it has been compiled as part of a police investigation about the deceased, however, it is information about the deceased and for that reason, I find that it is personal information. In regards to information about the deceased, it is well-established that deceased individuals do not lose all their privacy rights.[18]

[16] In regards to the rest of the information in dispute, it is personal information about third parties, including the names and titles of employees who worked on the disputed records, witnesses and possible suspects. I find that all of this information is personal information.

[17] The second step in a s. 22 analysis is to determine whether the personal information falls into any of the categories in s. 22(4), which set out specific circumstances when the disclosure of personal information is not an unreasonable invasion of personal privacy. As the applicant notes, s. 22(4)(e) exempts from s. 22(1) information about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff from being withheld under s. 22(1).[19] In Order F14-45, Adjudicator Barker described how s. 22(4)(e) has been applied in previous orders as follows:

> The context in which personal information appears plays a significant role in determining whether s. 22(4)(e) applies. In Order 01-53, former Commissioner Loukidelis found that a third party's name and other identifying information would, when appearing in the normal course of work activities, fall under s. 22(4)(e), but that s. 22(3)(d) would apply if the personal information appeared in the context of a workplace investigation

[16] Applicant's submission at para. 13 referring to Order 01-53 2001 CanLII 21607 (BC IPC), at para. 22.
[17] Applicant's submission at para. 15.
[18] Order No. 200-1997, 1997 CanLII 719 (BC IPC), at p. 6.
[19] Applicant's submission at para. 37.

> or disciplinary matter. This is the same approach taken in many other orders, where it was held that s. 22(4)(e) covers personal information that is about the third party's job duties in the normal course of work-related activities, namely objective, factual statements about what the third party did or said in the normal course of discharging his or her job duties but not qualitative assessments or evaluations of such actions.[20]
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> [Footnotes omitted]

[18] In this case, I find that the names and titles of employees who worked on the disputed records that are contained in the responsive records must be disclosed because this is information about their position as an employee of a public body in the normal course of their duties, therefore s. 22(4)(e) applies to that information.

[19] The third step in a s. 22 analysis is to consider whether any of the presumptions listed in s. 22(3) of FIPPA apply to personal information that does not fall within s. 22(4). Section 22(3) sets out circumstances where a disclosure of personal information is presumed to be an unreasonable invasion of personal privacy. It states in part:

> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
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> …
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> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation
>
> …

[19] The VPD submits that the disputed records were clearly compiled as part of a law enforcement investigation therefore the presumption in s. 22(3)(b) applies.[21]

[20] The applicant concedes that the disputed records were compiled as part of a VPD investigation.[22] He submits however, that the deceased's records "no longer serve a legitimate law enforcement function" therefore s. 22(3)(b) does not apply.[23] He questions what is being protected by refusing him access to the disputed information.[24]

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[20] Order F14-45, 2014 BCIPC 48 (CanLII) at para. 45. Section 22(3)(d), referenced in this quote, creates a rebuttable presumption against disclosing third party personal information related to employment, occupational or educational history.
[21] Public body's initial submission at para. 10.
[22] Applicant's submission at para. 12.
[23] Applicant's submission at para. 35.
[24] Applicant's submission at para. 34.

[21] In Order 305-1999, which the VPD cites, then Commissioner Flaherty set out the requirements in s. 22(3)(b) as follows:

> The only requirements under [s. 22(3)(b)] are that the personal information be compiled and be identifiable as part of an investigation into a possible violation of law. It matters not that the investigation is complete, nor that the personal information relates to a person who did not contravene the law.[25]

[22] In this case, I am satisfied by the records themselves and by the VPD's detailed submissions about the records (most of which were submitted to me *in camera*), that all of the disputed information was compiled and is identifiable as part of an investigation into a possible violation of law. As there is no evidence that this investigation is still active, I am satisfied that disclosure of the disputed investigation records are not necessary to prosecute any alleged violation or to continue with the investigation as set out in s. 22(3)(b). I therefore find that the presumption against disclosure in s. 22(3)(b) applies. The presumption can be rebutted if, after considering all relevant circumstances (including those listed in s. 22(2)), it is determined that disclosing the personal information would not be an unreasonable invasion of personal privacy.

[23] The fourth step in a s. 22 analysis is to consider all relevant circumstances, including those listed in s. 22(2), to determine if disclosure would be an unreasonable invasion of personal privacy.

[24] Section 22(2) 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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> …
>
> (i) the information is about a deceased person and, if so, whether the length of time the person has been deceased indicates the disclosure is not an unreasonable invasion of the deceased person's personal privacy.

[25] The applicant submits that disclosing the disputed information is desirable for the purpose of subjecting the activities of the VPD to public scrutiny because

[25] Order 305-1999, 1999 CanLII 1817 (BC IPC) at p. 7.

it is important to have public oversight of law enforcement.[26] The applicant submits that a coroner's inquest was held into the cause of the deceased's death, but that it was not a process of "general discovery" about the VPD's investigations of the deceased.[27] He alleges that the VPD's investigations were inadequate; therefore it is necessary in this case to examine the disputed records for the purpose of public oversight. The applicant notes that in his view, the deceased "would not likely oppose third party oversight of her police records if it promoted her cause."[28]

[26] In support of his position that third party personal information should be disclosed, the applicant cites Order 27-1994. In that Order, then Commissioner Flaherty ordered a public body to disclose information about a young person's suicide that took place at a treatment facility, because in his view, the information the public body had already disclosed left a "misleading impression about the [deceased's] quality and level of care".[29]

[27] The VPD submits that s. 22(2)(a) is not a factor weighing in favour of disclosing the disputed information, in particular because a coroner's inquest has been held.[30]

[28] In this case, I am not persuaded that disclosing any of the disputed information is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny. I am unable to discuss the contents of the disputed records in greater detail without revealing evidence from the VPD that I have received on an *in camera* basis and without revealing the very personal information that is in dispute.

[29] I am further persuaded that s. 22(2)(a) does not apply in this case because the deceased's death was investigated by a coroner.[31] In Order F09-19, cited by the VPD, an applicant alleged that the VPD mistreated a deceased individual prior to his death, and the applicant argued that access to the disputed records was necessary for the purpose of subjecting the VPD to public scrutiny. Adjudicator Francis determined that s. 22(2)(a) did not apply, stating:

> I do not agree with the applicant that disclosure would add to the public's understanding of the VPD's investigation into the third party's death. As noted elsewhere, the records show that there was an extensive police investigation into the homicide and that the coroner's inquest aired a number of issues surrounding the third party's death. Both activities

[26] Applicant's submission at para. 22.
[27] Applicant's submission at para. 46.
[28] Applicant's submission at para. 59.
[29] Order 27-1994 [2002] B.C.I.P.C.D. No. 26 (QL) at p. 9.
[30] Public body's reply submission at para. 11.
[31] In Order 27-1994, referenced above, the young person's suicide was being investigated by a coroner at the time the OIPC inquiry took place, but it was not yet complete.

> received extensive media coverage. I do not consider that disclosure of the records themselves would add meaningfully to the public's understanding of the investigation and I find that s. 22(2)(a) does not apply here.[32]

[30] The facts of this case are very similar to the facts in Order F09-19. In this case, the evidence is that the VPD investigated the deceased's death, that a coroner's inquest was held, and that both activities received extensive media coverage.[33]

[31] The VPD also cites Order F09-19 in support of its position that s. 22(2)(i) does not favour disclosure of the disputed information in this case. In that order, the deceased had been dead for twenty years. Adjudicator Francis determined that given the sensitivity of the disputed information, the passage of time did not reduce any impact the disclosure of the disputed information may have on the deceased's privacy.[34] In this case, the deceased died in 1989.[35] The applicant submits that because the deceased died in 1989, there can be no harm in disclosing the disputed records.[36] The applicant submits that "twenty years after death is suggested as a suitable limitation of a decedent's privacy concern."[37]

[32] Other OIPC Orders have found that s. 22(2)(i) is a relevant factor favouring disclosure of disputed information in cases where the length of time that has passed since the deceased's death was 42 years in one case and 34 years in another case.[38] In this case, I have considered when the deceased died, the sensitivity of the information in dispute, and the fact that the records also contain information about witnesses and possible suspects, and I have determined that s. 22(2)(i) is not a factor that favours disclosure of any of the information in dispute.

[33] In addition to the circumstances set out in ss. 22(2)(a) and (i), it is relevant to consider the applicant's argument that the disputed information has already been disclosed.[39] The applicant provided several pages of excerpts from two

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[32] Order F09-19 2009 CanLII 63567 (BC IPC), at para. 22.
[33] The applicant included news clippings and book excerpts about the deceased's life and death as part of his submission. The evidence is that police spent hours investigating her when she was alive as well as the circumstances of her death. The applicant also submits that a Coroner's inquest was held, and the VPD does not deny this.
[34] F09-19 at para. 23.
[35] The VPD does not indicate in its submissions when the deceased died. Newspaper articles submitted by the applicant report that the deceased died in 1989.
[36] Applicant's submission at para. 37.
[37] Applicant's submission at para. 24.
[38] Order F14-09 2014 BCIPC 11 (CanLII), at para. 34 and Order F14-32 2014 BCIPC 35 (CanLII), at para. 37.
[39] Adjudicator Flanagan noted: "Several orders have found that an applicant's awareness or knowledge of the withheld information is a relevant circumstance that public bodies should consider in applying s. 22." Order F13-12 2013 BCIPC 15 (CanLII), at para. 22.

books and several news articles written about the deceased, some of which refer in detail to VPD investigations. The VPD submits that, "to the knowledge of the VPD, the Responsive Records at issue in this Inquiry are *not* currently in the public domain or otherwise a matter of public record."[40]

[34] In considering whether information that has been published about the deceased is a factor that weighs in favour of disclosing the disputed information, I have considered Order 01-53, referred to by the applicant. In that Order, then Commissioner Loukidelis determined that

> …At one end of the scale, if the applicant clearly knows what the requested personal information is, because it has somehow become common public knowledge, the fact that the information is already publicly known may favour disclosure, although other factors (including the nature of the personal information) will also have to be examined.[41]

[35] Then Commissioner Loukidelis determined in that case that the applicant's knowledge of a workplace investigation did not favour disclosure of witness statements about the applicant.

[36] In this case, by including book excerpts and news articles, the applicant has demonstrated that information about the deceased related to the disputed records is already publicly known. The applicant has not demonstrated however, that the same information that is in dispute is publicly known. For example, the public information may contain details about police investigation reports, or results of polygraph tests, but they do not include copies of those reports and tests themselves, which contain more detailed information. In addition, the information in dispute is sensitive because it relates to police investigations, and this is a factor weighing against disclosure of information, even if it were already public.

[37] Another factor that weighs against the disclosure of the information is that all of the information the applicant provided about the deceased was published before FIPPA came into force in 1993. In Ontario Order 1717, cited by the VPD, then Assistant Commissioner Mitchinson determined that the Public Guardian and Trustee was not authorized to disclose third party personal information about an estate on the basis that it had disclosed this information before Ontario's FIPPA equivalent came into force.[42] I find this argument persuasive because permitting disclosures of personal information based solely on historical practices that predate access and privacy legislation would undermine the purposes of that legislation.

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[40] Public body's reply submission at para. 4.
[41] Order 01-53 2001 CanLII 21607 (BC IPC), at para. 77.
[42] Order PO-1717 1999 CanLII 14395 (ON IPC), at p. 4.

[38] For all of these reasons, I find that even though some information about police investigations pertaining to the deceased is already public knowledge, it is not exactly the same as the disputed information, it is sensitive, and the information published predates FIPPA. I therefore find that the s. 22(3)(b) presumption against disclosing the withheld information is not rebutted in this case.

[39] In summary, I find that all the disputed information is personal information. Under s. 22(4)(e), the names and titles of VPD employees who worked on the deceased's file must be disclosed because this is not an unreasonable invasion of their privacy under s. 22(1). I find that there is a presumption against disclosing the rest of the disputed information under s. 22(3)(b) because it was compiled as part of an investigation into a possible violation of law. No relevant factors, including those in s. 22(2), rebut this presumption. I have highlighted the names and titles of employees who worked on the disputed records in the copy of the records I am providing to the VPD.

[40] In reaching my conclusion that s. 22(1) applies to the disputed information, except for the names and titles of employees who worked on the deceased's file, I have considered whether the deceased's name should be disclosed given that the applicant already knows it, and whether standard information on the police and polygraph reports should be disclosed. The VPD says that it is not reasonable to sever and disclose this information because to do so would result in the applicant receiving meaningless information.[43] The applicant submits that information that may seem meaningless to the VPD may be meaningful to him.[44]

[41] I have determined that severing and disclosing this type of information from the disputed records would produce virtually meaningless information in this case, therefore it cannot be "reasonably severed" as provided by s. 4(2) of FIPPA. I note that in Order F07-04, which the VPD cites, then Commissioner Loukidelis reached a very similar conclusion with regard to the severing of VPD police reports related to 911 calls.[45]

ORDER

[42] For the reasons given above, under s. 58 of FIPPA, I order that:

1. Subject to paragraph 2 below, the VPD must refuse to disclose to the applicant information severed under s. 22 of FIPPA.

2. The VPD must disclose the information highlighted in yellow in the records which accompany the VPD's copy of this Order.

[43] Public body's submission at para. 26.
[44] Applicant's submission at p. 20.
[45] Order F07-04 2007 CanLII 9595 (BC IPC), at para. 43.

3. The VPD must disclose the information highlighted in yellow before December 31, 2015 pursuant to s. 59 of FIPPA. The VPD must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

November 18, 2015

ORIGINAL SIGNED BY

Caitlin Lemiski, Adjudicator

OIPC File No.: F14-57588