Protecting privacy. Promoting transparency.

Order F16-12

MINISTRY OF JUSTICE

Ross Alexander
Adjudicator

March 15, 2016

CanLII Cite: 2016 BCIPC 14
Quicklaw Cite: [2016] B.C.I.P.C.D. No. 14

Summary: A former Independent Investigations Office employee requested a report that a labour relations consultant prepared for the Deputy Attorney General in relation to a complaint the applicant made against his former employer. The Ministry of Justice withheld the report under s. 13 (policy advice or recommendations) and s. 22 (disclosure harmful to personal privacy) of FIPPA. The adjudicator determined that s. 22 of FIPPA applies to the report, so the Ministry is required to refuse to disclose it to the applicant.

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

Authorities Considered: B.C.: Order 01-53, 2001 CanLII 21607 (BC IPC); Order F14-18, 2014 BCIPC No. 21 (CanLII); Order F14-10, 2014 BCIPC 12 (CanLII); Order 03-16, 2003 CanLII (BC IPC).

INTRODUCTION

[1] This inquiry relates to a request for records by a former employee of the Independent Investigations Office ("IIO") to the Ministry of Justice (the "Ministry"). The request was for a report a labour relations consultant (the "consultant") provided to the Deputy Attorney General in relation to complaints by the applicant and another individual about the IIO.

[2] The Ministry responded by refusing to disclose the report to the applicant in its entirety under s. 13 (policy advice or recommendations) and s. 22

(disclosure harmful to personal privacy) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[3] The applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") review the Ministry's decision to withhold the report. Mediation did not resolve the matter, so it proceeded to inquiry under Part 5 of FIPPA.

[4] The applicant and Ministry each provided submissions for the inquiry. Further, the third party individual who was the primary subject of the complaints also provided submissions.[1]

ISSUES

[5] The issues in this inquiry are as follows:

a) Is the Ministry authorized to refuse access to information because disclosure would reveal advice or recommendations under s. 13 of FIPPA?

b) Is the Ministry required to refuse access to information because disclosure would be an unreasonable invasion of a third party's personal privacy under s. 22 of FIPPA?

[6] The Ministry has the burden of proof regarding s. 13 of FIPPA, while the applicant has the burden of proof regarding s. 22.[2]

DISCUSSION

[7] **Background** - The IIO is a civilian-led office with a mandate to conduct investigations into police officer-related incidents of death or serious harm, in order to determine whether an officer has committed an offense.

[8] The IIO is part of the Ministry. However, it operates independently from the Ministry due to its mandate. The IIO is under the command and direction of its Chief Civilian Director. The Chief Civilian Director is accountable to the Deputy Attorney General.

[9] The applicant is a former IIO employee. After his employment with the IIO was terminated, the applicant lodged a complaint with the Deputy Attorney

[1] The applicant submitted that the third party should not be permitted to make submissions in this inquiry. However, the OIPC decided that the third party is an appropriate person to be invited to participate pursuant to s. 54 of FIPPA.
[2] Section 57 of FIPPA.

General about multiple workplace issues at the IIO. A second individual also made a complaint about similar concerns.

[10] The Deputy Attorney General retained the consultant to gather information with respect to the two complaints. The consultant interviewed the applicant as part of this investigation.

[11] At the conclusion of the investigation, the consultant briefed the Deputy Attorney General. He also provided a report containing his review and conclusions. This is the report that is at issue in this inquiry. The applicant says he wants to see the consultant's report because he simply wants to know if the consultant substantiated his complaints.

[12] The Deputy Attorney General subsequently asked the Public Service Agency ("PSA") to investigate and provide advice on what steps, if any, may be necessary to ensure that the IIO's personnel practices meet the PSA's standards. The Deputy Attorney General advised the applicant and the other complainant of the investigation. At the time of this inquiry, the results of the PSA investigation were pending.

[13] **Record in Dispute** - The record in dispute is the consultant's four-page report to the Deputy Attorney General regarding the complaints made by the applicant and another complainant.

[14] **Preliminary Matter** - The applicant questions the credibility of an affiant who provided evidence for the Ministry. The Ministry refutes the applicant's concerns in its reply. However, it is not necessary for me to address the applicant's arguments about credibility because my decision in this inquiry does not turn on controversial facts or the credibility of this affiant.

Disclosure harmful to personal privacy – s. 22

[15] Since s. 22 of FIPPA is a mandatory provision, I will consider it first before turning to s. 13.

[16] The issue under s. 22 is whether the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy. Numerous orders have considered the analytical approach to s. 22. It is first necessary to determine if the information in dispute is "personal information" as defined by FIPPA. If so, s. 22(4) must be considered. 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, it is necessary to 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, it is still necessary to 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.

[17] The Ministry submits that the withheld information is personal information, and that s. 22(4) does not apply. It submits that the presumptions under ss. 22(3)(d) and (g) apply, so there is a presumption that disclosure would be an unreasonable invasion of personal privacy. It further submits that there are no circumstances of sufficient weight to rebut the presumption that s. 22 applies. It therefore submits that disclosure would be an unreasonable invasion of personal privacy under s. 22 of FIPPA.

[18] The applicant does not make any submissions regarding the application of s. 22. Instead, he states that:

> I am not making any submissions in this regard. I don't care who said what to whom. Again, did the report substantiate my complaint or not? I don't need or want any private information about anyone.
> …
> I ask that the Commissioner order the public body to disclose the [report] and only redact privacy information pursuant to Sec. 22.

[19] Most of the third party's submissions are *in camera*. His submissions regarding s. 22 only address s. 22(2) and the circumstances that he submits support a finding that disclosure would be an unreasonable invasion of his personal privacy.

Personal Information

[20] FIPPA defines "personal information" as "recorded information about an identifiable individual other than contact information". It defines the term "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".

[21] Nearly all of the report information is about identifiable individuals. It is information that is reasonably capable of being attributed to a particular individual, either alone or when combined with other available sources of information. Further, it is intertwined information of multiple people. The report contains the personal information of the third party, the applicant, the other complainant, the consultant and a few other people in the context of investigating the complaints. The only information that is not about an identifiable individual is

the generic, non-descriptive headings. The withheld information is not contact information.[3]

[22] For the reasons above, I find that the report information is personal information, except for the heading information. Section 22 does not apply to the heading information because it is not personal information.

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

[23] Section 22(4)(e) states that the disclosure of personal information about a public body employee's "position, functions or remuneration" is not an unreasonable invasion of the third party's privacy. However, s. 22(3)(d) states that disclosing 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.

[24] The Ministry submits that s. 22(3)(d) applies to all of the withheld information, and that s. 22(4)(e) does not apply to any information. The applicant and the third party do not provide submissions on these points.

[25] Sections 22(4)(e) and 22(3)(d) have been considered in numerous orders. In Order 01-53, former Commissioner Loukidelis determined that s. 22(3)(d) applies to information created in the course of a workplace complaint investigation that "consists of evidence or statements by witnesses or a complainant about an individual's workplace behaviour or actions".[4] He also found that s. 22(3)(d) applies to an investigator's observations or findings.

[26] The personal information at issue is in an investigation report arising out of complaints by the applicant and another individual about their former workplace. Since this personal information relates to a workplace investigation, I find that it falls under s. 22(3)(d) and not s. 22(4)(e).

Does s. 22(3)(g) apply?

[27] The Ministry also submits that s. 22(3)(g) applies to the withheld information. Section 22(3)(g) states that disclosure of personal information that "consists of personal recommendations or evaluations, character references or personnel evaluations about the third party" is presumed to be an unreasonable invasion of personal privacy.

---

[3] I note that the report does not contain contact-type letterhead that is ordinarily in letters or reports.

[4] Order 01-53, 2001 CanLII 21607 at para. 32. See also Order F14-18, 2014 BCIPC No. 21 (CanLII) at paras. 18 to 24.

[28] Previous orders have stated that s. 22(3)(g) applies to an investigator's evaluative statements of a third party's performance in the workplace.[5] Therefore, I find that s. 22(3)(g) applies to the consultant's assessments of the third parties' workplace performance.

Section 22(2)

[29] Section 22(2) states that all relevant circumstances, including those listed in s. 22(2), must be considered to determine whether the disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy.

[30] The applicant states that his concern is simple. He lodged a complaint with the Ministry, which hired someone to investigate the complaint. The applicant says that all he wants to know is whether the consultant substantiated his complaints.

[31] The Ministry replies that the purpose of the consultant's investigation was not to substantiate the applicant's complaint (or not), but rather to gather information for the Deputy Attorney General to determine whether any further action was required. As a result of the consultant's investigation and report, the Deputy Attorney General decided further action was required, so he referred the issue to the PSA. The Ministry further submits that disclosure of the withheld information would not provide the applicant with the information he is seeking because it does not provide conclusions which would either substantiate or refute his complaints.

[32] Based on my review of the report, it is my view that the report does reveal whether the consultant substantiated or rejected the applicant's various allegations.

[33] The applicant submits that telling a complainant whether his or her complaint was substantiated or rejected is consistent with the FIPPA principle of making public bodies more accountable.[6] I agree that this is a factor that weighs in favour of disclosure under s. 22 of FIPPA in this case.[7] However, there is also *in camera* evidence and submissions (which I cannot explain without revealing *in camera* materials) that diminish the weight of this factor. Further, there is also *in camera* information about other factors that weigh against disclosure.

---

[5] Order F14-10, 2014 BCIPC 12 (CanLII) at para. 19.
[6] Section 2 of FIPPA.
[7] I note that informing a complainant about whether his or her complaint was substantiated is different than telling the complainant details of the decision. Previous orders have consistently determined, ordinarily in the context of s. 22(2)(a) of FIPPA, that a complainant's interest in knowing details of the decision regarding his or her complaint does not weigh in favour of disclosure. For example, see Order F14-18, 2014 BCIPC No. 21 (CanLII) at paras. 31 to 36.

[34] In my view, the fact that a complainant knows (and supplied) his or her own complaint will ordinarily significantly weigh in favour of disclosing this information. I find that the applicant's knowledge of his own complaint (which he supplied) is a factor in favour of disclosure of the information in the report that discloses the applicant's complaint. However, I give this factor less weight here than in most situations,[8] due to the specific content of the report. In this case, the consultant reframes the applicant's complaint in the report (*i.e.*, the report does not contain an exact copy, or quotation, of the applicant's complaint in his own words). Further, and more importantly, the applicant's complaint information is combined and intertwined with the other individual's complaints. Therefore, disclosing the applicant's complaint information to the applicant would also reveal to him information about the other individual's complaint (which contains personal information about the other complainant and the third party) that the applicant did not supply and may not know. In these circumstances, even though the complainant clearly knows the information in the report that discloses his own complaint, I do not give the applicant's knowledge of this information significant weight regarding its disclosure because of the other information that would also be revealed.

Conclusions for s. 22

[35] I have determined that the report contains personal information, and that there is a presumption that disclosure of this information would be an unreasonable invasion of the personal privacy of third parties.

[36] I have considered all of the relevant circumstances, including those listed in s. 22(2). I find that the presumption that disclosure of the personal information would be an unreasonable invasion of the third parties' personal privacy has not been rebutted, including for the information that discloses the subject matter of the applicant's complaint. I therefore find that s. 22 requires the Ministry to withhold the personal information.

Severance

[37] The applicant asks that the report be disclosed, and that only the "privacy information pursuant to s. 22" be redacted. This is, in effect, an argument that information should be severed under s. 4(2) of FIPPA. Section 4(2) of FIPPA requires a public body to provide access to part of a record, if the information in the record that is properly excepted from disclosure can reasonably be severed from the record.

[38] In Order 03-16, former Commissioner Loukidelis agreed with the public body that "reasonably be severed" under s. 4(2) "means that after the excepted information is removed from a record, the remaining information is both

[8] For example, see Order F14-18, 2014 BCIPC No. 21 (CanLII).

intelligible and responsive to the request."[9] He further stated that where "the remainder of a severed record consists of disconnected words or snippets of sentences that cannot reasonably be considered intelligible, it is not reasonable to sever under s. 4(2)."[10]

[39] In this case, it is possible to sever significant portions of the report and then disclose the remainder to the applicant. However, it would result in disconnected words or snippets of sentences that, in my view, would be misleading or unintelligible. Thus, I find that such severing is not reasonable in this case. Further, I find that the generic heading information that I previously found was not personal information cannot be reasonably severed in this case, since these isolated headings are not descriptive and are essentially meaningless without their surrounding context. I therefore find that information cannot reasonably be severed from the report within the meaning of s. 4(2) of FIPPA.

CONCLUSION

[40] For the reasons given, under s. 58 of FIPPA, I order that the Ministry is required to refuse to disclose the report to the applicant under s. 22(1) of FIPPA.

March 15, 2016

ORIGINAL SIGNED BY

Ross Alexander, Adjudicator

OIPC File No.: F15-61327

[9] Order 03-16, 2003 CanLII 49186 at paras. 53 and 54; This quote is from the Government FOIPP Act Policy and Procedures Manual: http://www.cio.gov.bc.ca/cio/priv_leg/manual/sec01_09/sec4.page?
[10] Order 03-16, 2003 CanLII 49186 (BC IPC) at para. 54.