Office of the Information & Privacy Commissioner for British Columbia

Protecting privacy. Promoting transparency.

Order F16-36

BC EMERGENCY HEALTH SERVICES

Ross Alexander
Adjudicator

July 18, 2016

CanLII Cite: 2016 BCIPC 40
Quicklaw Cite: [2016] B.C.I.P.C.D. No. 40

Summary: An applicant requested a 911 transcript relating to a bicycle accident in which she was seriously injured. BC Emergency Health Services disclosed most of the transcript, but it withheld information that revealed the identity of the 911 caller under s. 22 of FIPPA (disclosure harmful to personal privacy). The 911 caller was the other cyclist involved in the accident. After stating that s. 22 ordinarily applies to the identities of 911 callers, the adjudicator determined that s. 22 does not apply in this case. The adjudicator ordered BCEHS to disclose the withheld information to the applicant.

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

Authorities Considered: B.C.: Order F15-28, 2015 BCIPC 31 (CanLII); Order F05-30, 2005 CanLII 32547 (BC IPC); Order P12-01, 2012 BCIPC 25 (CanLII); Order 02-20, 2002 CanLII 42445 (BC IPC); Order 02-27, 2002 CanLII 42457 (BC IPC); Order F05-31, 2005 CanLII 39585 (BC IPC); Order F05-18, 2005 CanLII 24734 (BC IPC); Order 01-07, 2001 CanLII 21561 (BC IPC); Order F12-08, 2012 BCIPC 12 (CanLII); Order F15-50, 2015 BCIPC 53 (CanLII); Order F15-50, 2015 BCIPC 53 (CanLII); Order 02-23, 2002 CanLII 42448 (BC IPC); Order F08-13, 2008 CanLII 41151 (BC IPC); Order F12-12, 2012 BCIPC 17 (CanLII); Order F13-12, 2013 BCIPC 15 (CanLII); **ON:** Order MO-2677, 2011 CanLII 83491 (ON IPC).

Cases Considered: *John Doe v. Ontario (Minister of Finance)*, 2014 SCC 36; *Kenney v. Loewen* (1999), 64 B.C.L.R. (3d) 346 (S.C.); *British Columbia (Ministry of Public Safety and Solicitor General) v. Stelmack*, 2011 BCSC 1244.

INTRODUCTION

[1] This inquiry is about an applicant's request to BC Emergency Health Services ("BCEHS") for a 911 transcript relating to a bicycle accident in which the applicant was seriously injured. The 911 caller was the other cyclist involved in the accident.

[2] BCEHS disclosed most of the 911 transcript to the applicant, but it withheld the 911 caller's telephone number, gender and first name (the transcript does not contain the 911 caller's surname) on the basis that disclosure would be an unreasonable invasion of the personal privacy of a third party under s. 22 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 BCEHS' decision. Mediation did not resolve this matter, and the applicant requested that it proceed to inquiry.

[4] BCEHS asked the Commissioner to exercise her discretion under s. 56 of FIPPA to not hold an inquiry on the basis that it is plain and obvious that disclosure of the withheld information would be an unreasonable invasion of personal privacy under s. 22 of FIPPA. In Order F15-28,[1] Adjudicator Flanagan concluded it was not plain and obvious that s. 22 applies, so BCEHS' request that an inquiry not be held was denied.

[5] The applicant and BCEHS provided submissions for this inquiry. I decided that the 911 caller was an appropriate party to invite to participate in the inquiry, and the OIPC attempted to notify the 911 caller.[2] However, the 911 caller did not participate.

ISSUE

[6] The issue in this inquiry is whether BCEHS 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.

[7] 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.

---

[1] Order F15-28, 2015 BCIPC 31 (CanLII).

[2] BCEHS notified the OIPC Registrar that it does not know the identity of the 911 caller. The OIPC's telephone calls to the 911 caller's telephone number were not answered. The OIPC left several voicemails, and stated that this inquiry would proceed without the 911 caller's participation if there was no response within a specified time period. The 911 caller did not respond.

DISCUSSION

[8] **Background** - BCEHS is responsible for 911 dispatching and ambulance services in British Columbia. In the course of 911 calls, BCEHS often collects the telephone number of the caller, so the dispatcher can call the person back in the event the call is disconnected. The telephone number can also assist emergency responders in locating and identifying the people in need of assistance.

[9] In March 2014, the applicant was cycling up a hill on a trail in Pacific Spirit Park in Vancouver. Pacific Spirit Park is located in the University Endowment Lands, near the University of British Columbia.

[10] The applicant was involved in a head-on bicycle accident with another cyclist who was coming downhill. The applicant was knocked unconscious for a period of time. The other cyclist called 911.

[11] During the 911 call, the caller provided his or her telephone number to BCEHS. The caller described the accident as follows:

> …So I was riding extremely fast down this hill, and a woman was coming up it, and I couldn't stop in time, and we had a head-on collision.[3]

[12] Both paramedics and the applicant's husband attended the accident scene. The 911 caller remained at the scene until the applicant was put on a stretcher. The applicant was transported to hospital, where she was admitted for a fractured vertebrae and skull.

[13] The applicant spent approximately two months in a neck brace. The applicant states that she wants to know the identity of the 911 caller so she can pursue resolution, closure and possibly compensation.[4] She further explains that:

> I have incurred serious injuries and am still recovering. I will likely have a painful stiff neck for the rest of my life. I also incurred direct financial costs as a result of being hit. I am not sure how/if I want to pursue those at this point. But without [the 911 caller's] name and contact information I cannot pursue this if I choose. I want to keep that option open for now….
>
> As I have said all along, my preference would be to avoid any form of legal involvement; what I want most of all is to simply talk to [the 911 caller] as a human and have some meaningful closure.

[3] Transcript of the 911 call. This has already been disclosed to the applicant.
[4] Applicant's request for review.

> I have a clear legal basis for a lawsuit, as is evident from my injuries and from statements in the 911 transcript. As I have repeatedly made clear, I am seeking to avoid legal action and to pursue a constructive process of healing and resolution. I cannot pursue that approaching without the personal information…[5]

[14] **Information at Issue** - The record at issue is a 911 transcript. It contains information such as the location of the accident, the 911 caller's account of the accident (*i.e.* that the caller was cycling fast downhill, could not stop in time, and had a head-on collision with the applicant), and the 911 caller's description of the applicant and her injuries.

[15] BCEHS has already disclosed nearly all of the transcript information to the applicant. The only withheld information is the 911 caller's cellular telephone number, and information that reveals the first name and gender of the 911 caller.[6]

Section 22

[16] 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 the 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.

---

[5] Applicant's submissions at para. 6. The applicant states that she made these statements in writing during the process of mediation and requesting an inquiry. Ordinarily, mediation materials are not admissible. I find that the content of this evidence is admissible, but not the fact that it was said during mediation. Further, I note that BCEHS does not object to the admissibility of this information, and that paragraph 3 of its reply submissions appears to be partly or wholly based on this evidence.

[6] BCEHS is withholding multiple first names in the transcript, although its submissions only assert that s. 22 applies to the 911 caller. It is not apparent that s. 22 would apply to the first names of people other than the 911 caller. However, it is not obvious from the 911 transcript which first name is the first name of the 911 caller. Therefore, for ease of reference, in this Order I consider all of the withheld first names as if they are the first name of the 911 caller.

Personal Information

[17] FIPPA defines personal information as recorded information about an identifiable individual other than contact information.[7] Information is about an identifiable individual when it is reasonably capable of identifying a particular individual or a small group of identifiable people,[8] either alone or when combined with other available sources of information.[9] Contact information is not personal information. FIPPA defines contact information, in part, as "information to enable an individual at a place of business to be contacted".

[18] Most of the withheld information in dispute is the 911 caller's first name and cellular telephone number. To the extent that this information is capable of revealing the identity the 911 caller, it is clearly personal information. It could be argued that this information does not identify the 911 caller on that basis that a first name and telephone number do not reveal an identifiable individual.[10] However, I expect that the applicant could combine this information with other information she already knows, or other available information, to reveal the identity of the 911 caller. I therefore find that this information is about an identifiable individual. Further, it is not contact information because it is not information to enable an individual be contacted at a place of business.

[19] The only other information BCEHS is withholding as identity information is information that discloses the 911 caller's gender. However, BCEHS' submissions do not specifically address this information, and I find that it does not disclose the 911 caller's identity. There is nothing in the content or context of this information which suggests that it is about an identifiable individual, and I find that it is not personal information.[11]

[20] I have determined that the 911 caller's first name and telephone number is personal information because it discloses the 911 caller's identity. However, in considering s. 22, it is also necessary to consider whether disclosure of the caller's identity would reveal other personal information. I believe that it would in this case. In my view, disclosing the 911 caller's name and telephone number would change some of the transcript information that BCEHS has already disclosed to the applicant into personal information because it would become attributable to the 911 caller as an identifiable individual.

---

[7] Schedule 1 of FIPPA.
[8] See, for example, Order F05-30, 2005 CanLII 32547 (BC IPC) at para. 35.
[9] See Order P12-01, 2012 BCIPC 25 (CanLII) at para. 85.
[10] If the withheld information would not reveal the identity of the 911 caller, s. 22 would not apply.
[11] Further, in any event, both the applicant and her husband saw the 911 caller at the accident scene, and the applicant specifies the 911 caller's gender in her submissions. Disclosure of this information would clearly not be an unreasonable invasion of personal privacy under s. 22 of FIPPA.

Section 22(4)

[21] Section 22(4) of FIPPA lists circumstances in which the disclosure of personal information is not an unreasonable invasion of a third party's personal privacy under s. 22. Neither party submits that s. 22(4) applies in the case.

[22] Based on the materials before me, I find that none of the grounds listed in s. 22(4) apply to the withheld information.

Section 22(3)

[23] Section 22(3) states that the disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if any of the circumstances in s. 22(3) apply. The only provision under s. 22(3) that BCEHS raises is s. 22(3)(j), which relates to mailing lists and solicitations.

[24] I agree with BCEHS that the provisions in s. 22(3), other than s. 22(3)(j), do not apply. This includes s. 22(3)(b), which I specifically note because there are previous orders about 911 calls where it has been determined that s. 22(3)(b) applied. Section 22(3)(b) applies to personal information that 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 continuethe investigation". This provision applied in those cases because the 911 call triggered a police investigation into a possible violation of law. There is no suggestion of that being the case here, and I find that s. 22(3)(b) does not apply.

Is the personal information to be used for mailing lists or solicitations by telephone or other means? – s. 22(3)(j)

[25] BCEHS submits that s. 22(3)(j) applies, while the applicant submits that it does not. Section 22(3)(j) states the disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if "the personal information consists of the third party's name, address, or telephone number and is to be used for mailing lists or solicitations by telephone or other means".

[26] BCEHS submits that the applicant intends to solicit the 911 caller by telephone to gather information about the accident. It also states that a careful reading of the applicant's submissions discloses that the applicant intends to contact the 911 caller to pursue a damages settlement outside of a formal legal proceeding. BCEHS submits that these potential uses of the information fall under the meaning of "solicitation" in s. 22(3)(j), and it cites the *Black's Law Dictionary* definition of "solicitation" in support.

[27] BCEHS also cites Order 02-20 in furtherance of its position. Order 02-20 states that the term "solicitation" in s. 22(3)(j) may encompass solicitations for purposes other than commercial purposes.[12] BCEHS submits that the applicant will likely attempt to contact the caller to seek a resolution, including to solicit financial compensation, which could be perceived by the 911 caller as harassment and a threat of litigation. It submits that this is exactly the type of invasion of privacy that s. 22(3)(j) is intended to protect against.

[28] The applicant submits that her intended use is not, and should not be construed as, "solicitation".

[29] The modern approach to statutory interpretation requires that the words of legislation "be read in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of the legislature".[13]

[30] Section 22(3)(j) refers to "mailing lists or solicitations". In this case, the pertinent issue is whether the 911 caller's identity information will be used for "solicitations". *Black's Law Dictionary* states, in part, that "solicitation" means "[t]he act or an instance of requesting or seeking to obtain something; a request or petition".[14] Further, the *Webster's New World College Dictionary* defines the word "solicit", in part, as: "to ask or seek earnestly or pleadingly; appeal to or for [to *solicit* aid, to *solicit* members for donations]".[15]

[31] The term "solicitations" in s. 22(3)(j) follows the term "mailing lists", and in my view it should be considered in this context. As stated in Order 02-27, solicitation for the purposes of s. 22(3)(j) "generally will involve an approach to someone in order to enlist that person's support for something or in order to sell something to that person."[16] In my view, the term "solicitation" ordinarily connotes a situation where the recipient of the solicitation has no existing – or contingent – obligations to the person making the request regarding the subject matter of the request. It is generally a request that the recipient of the solicitation voluntarily do, or provide, something either *gratis* or in exchange for goods or services.

[32] In this case, the applicant is attempting to identify a third party who may be liable to her in relation to a bicycle accident. Thus, disclosure to the applicant may result in the applicant contacting the 911 caller, and making a demand or

---

[12] Order 02-20, 2002 CanLII 42445 (BC IPC) at para. 27. The solicitations in that case were for political purposes.
[13] *John Doe v. Ontario (Minister of Finance)*, 2014 SCC 36 at para. 18 citing (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1 and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.
[14] *Black's Law Dictionary*, 8th ed., s.v. "solicitation".
[15] *Webster's New World College Dictionary*, 5th ed., s.v. "solicit".
[16] Order 02-27, 2002 CanLII 42457 (BC IPC) at para. 17.

threatening litigation. BCEHS submits that it is this sort of use that s. 22(3)(j) is intending to protect third parties against. I disagree. In my view, s. 22(3)(j) is intended to prevent personal information being used in "mailing lists or solicitations", which are ordinarily situations where an applicant is attempting to enlist a person's support or trying to sell them something. Section 22(3)(j) is about junk-mail, targeted advertising or support for issues, not a genuine attempt to settle a legal dispute. This interpretation is supported by the Legislature's use of the terms "solicitations" and "mailing lists" in plural – rather than singular – which in my view provides further indication that s. 22(3)(j) is intended to apply to requests for multiple solicitations rather than a demand or request to one third party for a specific purpose.[17]

[33] This is not the first time an order of this Office has considered the issue of whether s. 22(3)(j) applies in circumstances where the applicant wants information for the purpose of identifying and suing the person. In Order F05-31,[18] Adjudicator Francis determined that "[a] stated intention to sue someone does not constitute a use contemplated by s. 22(3)(j) and I find that this section does not apply to the third party's name."[19] I agree. In my view, the term "solicitations" under s. 22(3)(j) does not apply in this case merely because the applicant is likely to use the 911 caller's contact information to pursue resolution, closure and compensation regarding the accident.

[34] For the reasons above, I find that s. 22(3)(j) does not apply to the withheld information.

Section 22(2)

[35] Section 22(2) states that all relevant circumstances, including those listed in s. 22(2), must be considered. BCEHS submits that ss. 22(2)(b) and (f) support a finding that s. 22 applies to the withheld information, while ss. 22(a) and (c) are not relevant factors. The applicant submits that s. 22(2)(c) supports disclosure of the withheld information. 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
>
> (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,

[17] I note that this view is consistent with *House (Re)*, [2000] N.S.J. No. 473 at para. 13, in which G.R.P. Moir J. stated that the Nova Scotia equivalent of s. 22(3)(j) OF FIPPA [s. 22(3)(i) of Nova Scotia's *Freedom of Information and Protection of Privacy Act*] did not apply because only the name and address of one motor vehicle owner was requested.
[18] Order F05-31, 2005 CanLII 39585 (BC IPC).
[19] Order F05-31, 2005 CanLII 39585 (BC IPC) at para. 35.

> (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
>
> …
>
> (f) the personal information has been supplied in confidence,
>
> …

Section 22(2)(a)

[36] As stated in Order F05-18, the disclosure of personal information is desirable in some circumstances because it fosters the accountability of a public body by subjecting its activities to public scrutiny.[20] However, I find that disclosure of the telephone number and name of the 911 caller would add nothing to the public's ability to scrutinize BCEHS's activities, let alone that such disclosure would be desirable for this purpose. Therefore, s. 22(2)(a) is not a relevant factor.

Section 22(2)(b)

[37] Section 22(2)(b) requires consideration of whether "the disclosure is likely to promote public health and safety or to promote the protection of the environment". BCEHS submits that s. 22(2)(b) is relevant because disclosure will harm public health and safety by undermining the public's trust in the confidentiality of emergency calls, which will deter people from calling 911.

[38] I find that s. 22(2)(b) is not a relevant factor because disclosure clearly would not *promote* the health and safety of the public. I will address BCEHS' concerns about how disclosure would result in harm to public health and safety when I discuss other factors below.

Section 22(2)(c)

[39] Section 22(2)(c) applies to "personal information that is relevant to a fair determination of the applicant's rights". The applicant submits that s. 22(2)(c) favours disclosure of the withheld information, while BCEHS submits that it does not.

[20] Order F05-18, 2005 CanLII 24734 (BC IPC).

[40] In Order 01-07, former Commissioner Loukidelis adopted a test for s. 22(2)(c) from an Ontario order, which has consistently been used in subsequent orders. This test is as follows:

> 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
>
> 4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.[21]

[41] I will now address the four elements of this test.

Part one – there is a legal right

[42] Part one of the test is that the right in question must be a legal right, as opposed to only a moral or ethical non-legal right. The identity of the 911 caller who collided with and injured the applicant clearly relates to a legal right to sue for damages, so part 1 of the test is met.

Part two – a proceeding is under way or contemplated

[43] The test requires that the legal right be related to a proceeding that is either underway or contemplated. Since a proceeding was not underway at the time of the inquiry, the issue here is whether a proceeding is contemplated.

[44] In recent years, two differing views have emerged regarding the application of "contemplated" as set out in the s. 22(2)(c) test.

[45] One line of cases states that "contemplated proceedings" refers to situations where a decision *has been made* to commence legal proceedings. These orders state that s. 22(2)(c) would be too open-ended if it applied any time an incident took place that caused someone to consider commencing legal proceedings.[22]

[46] The other line of cases imply that the second element of the s. 22(2)(c) test may be met where there are contextual factors corroborating an applicant's

[21] Order 01-07, [2001] B.C.I.P.C.D. No. 7 at para. 31 citing Ontario Order P-651, [1994] O.I.P.C. No. 104.
[22] Order F12-08, 2012 BCIPC 12 (BC IPC) at paras. 29 to 32.

assertion that there is a reasonable prospect of litigation, even if no decision has been made to commence legal proceedings. For instance, in determining that part two of the test was met in Order F15-50, Adjudicator Flanagan accepted that an applicant's pursuit of information in an OIPC inquiry was an indication of his commitment to pursue a proceeding.[23]

[47] For the reasons that follow, I agree with the second line of cases, in that it is not necessary for an applicant to have already made a decision to commence legal proceedings in order for part two of the test to be met. As I will explain below, part two of the s. 22(2)(c) test is met where the evidence establishes that an applicant is intently considering the commencement of a proceeding.

[48] This conclusion is derived in part from the ordinary meaning of the word "contemplate", which *Webster's New World College Dictionary* defines, in part, as: "…to think about intently; study carefully…to have in mind as a possibility or plan; intend".[24]

[49] In my view, applying the plain and ordinary meaning of "contemplated" would not result in s. 22(2)(c) being too open-ended. To begin with, this element is only one of four that must be satisfied to meet the s. 22(2)(c) test. Further, s. 22(2)(c) itself is only one of the myriad of circumstances that must be considered and weighed in determining whether disclosure of the personal information would be an unreasonable invasion of personal privacy.[25] In any event, this interpretation more fairly captures the intent of s. 22(2)(c), which applies to personal information that is *relevant* to a fair determination of an applicant's rights. In my view, the ordinary meaning is consistent with the wording of s. 22(2)(c), its purpose within the scheme and object of FIPPA, and the intention of the Legislature.

[50] To summarize, part two of the test under s. 22(2)(c) is met if the evidence establishes that the applicant is contemplating (*i.e.* intently considering) commencing a proceeding. The context of the situation must be taken into account in determining whether this has been established, and an applicant's assertion that he or she is contemplating litigation is – on its own – not necessarily determinative.

[51] While the applicant in this case wants to pursue a constructive process of reconciliation and emotional closure, she also submits that she has a clear legal basis for a lawsuit. The applicant references a legal basis for a lawsuit and makes statements such as "I would also require the information in order to proceed with [a] court action in the event that I [choose] to pursue that option". It

[23] Order F15-50, 2015 BCIPC 53 (CanLII) at para. 24.
[24] *Webster's New World College Dictionary*, 5th ed., s.v. "contemplate".
[25] I note that s. 22(2) differs significantly from s. 22(4), which is determinative in that s. 22(4) sets out types of information for which disclosure is not an unreasonable invasion of personal privacy.

is evident that this is a significant reason why she is seeking the information that is at issue. Therefore, based on the materials before me, I find that a proceeding is contemplated within the meaning of part two of the test.

Part three – the information has a bearing on the legal right

[52] Part three of the s. 22(2)(c) test requires that "[t]he personal information sought by the applicant have some bearing on, or significance for, determination of the right in question". In other words, part three is about a demonstrable nexus between the personal information that is at issue and the applicant's legal right.

[53] The personal information in question in this case relates to the identity of the 911 caller. I find that the applicant's ability to learn the 911 caller's identity has a bearing on, or significance for, the determination of the applicant's legal rights regarding the 911 caller.

Part four – the information is necessary to prepare for the proceeding or to ensure a fair hearing

[54] In this case, there is little doubt that the applicant will need to know the 911 caller's identity for there to be a fair determination of her rights, if she makes a claim for damages against the 911 caller.[26] Therefore, the withheld information at issue (which discloses the 911 caller's identity) is "necessary in order to prepare for the proceeding or to ensure a fair hearing".

[55] However, a number of previous orders have determined that part four of the test is not met if the applicant is able to get the information by another means (*i.e.* court proceedings, etc.). In other words, these orders have required the applicant to establish that *disclosure* by way of the freedom of information ("FOI") process is needed in order for part four of the test to apply. For example, Order F05-31[27] involved an applicant who wanted a third party's identity information for the purpose of commencing an action against the third party for defamation. The adjudicator in that case determined that s. 22(2)(c) did not apply, in part, because the applicant could commence a "John Doe" court action without the identity information, so the applicant did not *need* the personal information to be disclosed as part of the FOI process. Similarly, in Order F15-50 the adjudicator determined that part 4 of the test did not apply because the applicant could obtain the withheld identifying information through the courts, so disclosure as

[26] The applicant cannot name the 911 caller as the defendant without knowing his or her identity. Further, if the applicant commenced a proceeding without naming the 911 caller, it is doubtful that she could have a fair hearing into the merits of her claim without knowing the identity of, or providing notice to, the 911 caller. In any event, the applicant would also need to know the 911 caller's identity to enforce any award for damages, if she was successful with her potential claim.
[27] Order F05-31, 2005 CanLII 39585 (BC IPC).

part of the FOI process was not necessary for the applicant to obtain a fair determination of his rights.[28] This case is similar to these orders in that the applicant could presumably commence a John Doe court action, then seek an order – often referred to as a *Norwich* order[29] - requiring a third party (such as the BCEHS) to disclose the 911 caller's identity.

[56] In my view, the approach of reading in a requirement that part four of the test is only met in situations where the FOI process is an applicant's sole way to receive the information is inconsistent with s. 22(2)(c), as interpreted using modern statutory interpretation principles.[30] Section 22(2)(c) is about whether the *personal information* itself is necessary in order to prepare for the proceeding or to ensure a fair hearing. It is not about whether *disclosure* of the personal information through FOI is necessary for that purpose. Since some of the enumerated factors in s. 22(2) are about the "disclosure" of information, while others are about the "personal information", in my view there is clear Legislative intent with respect to this distinction. For example, ss. 22(2)(a) to (d) and (f) state:

> (2) the head of a public body must consider all the relevant circumstances, including whether
>
> (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,
>
> (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
>
> (d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,
>
> …
>
> (f) the personal information has been supplied in confidence,
>
> [Underlining added]

[57] In my view, the above noted distinction means that the applicant's ability to get "disclosure" by means other than FIPPA does not vitiate the applicability of s. 22(2)(c).

[58] I am not suggesting that an applicant's ability to obtain personal information through litigation disclosure processes, or by some other way, cannot

[28] Order F15-50, 2015 BCIPC 53 (CanLII) at para. 28.
[29] See, for example, *Kenney v. Loewen* (1999), 64 B.C.L.R. (3d) 346 (S.C.).
[30] I note that it is well-recognized that *stare decisis* does not apply to administrative tribunals such as the OIPC.

be a relevant consideration. In many cases, this consideration impacts the weight accorded to s. 22(2)(c) when considering the ultimate question of whether disclosure would be an unreasonable invasion of personal privacy under s. 22(1), and there may also be other related factors to consider.

[59] However, there are reasons why part four of the test should not turn exclusively on an applicant's ability to obtain information by other means, such as a litigation disclosure process.[31] Summarily rejecting s. 22(2)(c) because an applicant can likely get the information by another means may in some cases circumscribe the applicant's access rights, and, for example, result in the applicant needing to incur more time and costs to get information through another proceeding (*i.e.* it may require one or more applications and court appearances to be able to get the information in a proceeding). Further, it may fail to take into account the timing of the disclosure (*i.e.*, it may be probative for the applicant to receive information before a proceeding is commenced or before disclosure in a proceeding is required), or result in the applicant not receiving some or all of the information through disclosure processes in the relevant proceeding.[32] In short, summarily dismissing s. 22(2)(c) because the applicant may be able to receive the information by another means may result in prejudice to the applicant in relation to his or her legal rights.

[60] The view that the fourth part of the s. 22(2)(c) test may apply notwithstanding an applicant's ability to acquire the information as part of a court process is not a novel approach. For instance, in Order 02-23, in response to a public body's argument that s. 22(2)(c) did not apply because the applicant could get the information through court processes, former Commissioner Loukidelis rejected "the notion that discovery under the *Rules of Court* or some other process displaces the right of access under the Act or should prevent it from operating".[33]

[61] Parts three and four of the s. 22(2)(c) test are similar, and previous jurisprudence regarding these provisions may have developed in part to differentiate these two elements of the test. However, in my view, the appropriate distinction between these parts of the test are demonstrated in Order 02-23.[34] In that order, a landlord requested a former tenant's mailing address in order to serve her with an arbitrator's damages award under the *Residential Tenancy Act*, and to get a court order to enforce the award in the event the

[31] For clarity, I am not suggesting that there are not also public policy grounds which support the previous approach, as I expect that this approach was adopted to attempt to avoid the time and expense that may be associated with duplicitious disclosure proceedings.
[32] I note that the considerations that go into a person's entitlement to records under FIPPA (see s. 4 of FIPPA regarding information rights) differ in many respects from disclosure processes in most types of proceedings.
[33] Order 02-23, 2002 CanLII 42448 (BC IPC) at para. 18.
[34] Order 02-23, 2002 CanLII 42448 (BC IPC).

tenant did not pay. In determining that parts three and four of the s. 22(2)(c) test were met, former Commissioner Loukidelis stated the following:

> …Third, the personal information in question – again, only the third party's address – has significance for the determination, or implementation, of the legal right to damages. Fourth, the personal information is necessary for the applicants to be able to serve their former tenant with notice of an RTA hearing and to enforce their damages award.[35]

[62] While part three is about the connection between the withheld personal information and a legal right, part four is about the connection between the personal information and a proceeding that is underway or contemplated. As shown above, in many cases this is a fine distinction.

[63] Part four is about determining whether the personal information is necessary in order to prepare for the proceeding or to ensure a fair hearing. In my view, it is not limited to situations where the FOI process is an applicant's only means of receiving the information.[36] As previously stated, I find that the withheld personal information in this case is necessary in order to prepare for the proceeding or to ensure a fair hearing. Therefore, for the reasons above and notwithstanding that the applicant may be able to learn the 911 caller's identity as part of a court process, I find that the 911 caller's identity information falls within the meaning of part 4 of the test for s. 22(2)(c).

Conclusion under s. 22(2)(c)

[64] In summary, I find that the withheld personal information is relevant to a fair determination of the applicant's rights within the meaning of s. 22(2)(c) of FIPPA.[37]

[65] I attribute significant weight to s. 22(2)(c) in this case because the applicant will be prejudiced in relation to her legal rights if she is not able to receive the withheld identity information through this FOI proceeding. The prejudice in this case is that if the applicant does not receive disclosure of the 911 caller's identity information here, she will be forced to spend more time

---

[35] Order 02-23, 2002 CanLII 42448 (BC IPC) at para. 21.

[36] In reaching the above conclusion, I note that am aware of the obiter in *British Columbia (Ministry of Public Safety and Solicitor General) v. Stelmack*, 2011 BCSC 1244 at para. 518, which was a judicial review of Order F08-13, 2008 CanLII 41151 (BC IPC), and the resulting order in Order F12-12, 2012 BCIPC 17 (CanLII) at para. 40.

[37] Even if I am wrong in finding that s. 22(2)(c) applies, in my view disclosure of the 911 caller's identity information for legal purposes would nonetheless favour its disclosure as a non-enumerated factor under s. 22(2). This is because the applicant needs to know the 911 caller's identity for a fair adjudication of her legal rights. I note that disclosure here may also prevent a court case, or – even if not – save time, money and court resources.

and resourses to pursue a claim against the 911 caller.[38] Further, I note that disclosure as part of the FOI process would enable the applicant to have an opportunity to attempt to address and resolve her legal issue with the 911 caller without having to commence an action, which is not the case if the information is not released.[39]

Section 22(2)(f)

[66] Section 22(2)(f) relates to whether the personal information has been supplied in confidence.

[67] BCEHS submits that s. 22(2)(f) strongly weighs against disclosure in this case. It states that members of the public make calls to 911 seeking emergency assistance with the reasonable belief that the call, and any information supplied during the conversation with the 911 operator, will be treated as strictly confidential and will not be disclosed to third parties. BCEHS further states that BCEHS treats 911 callers' contact information as confidential. It also notes that former Commissioner Flaherty said that "any information supplied during the conversation with a 911 operator is in the strictest confidence".[40]

[68] The applicant does not address s. 22(2)(f).

[69] There is no evidence from the 911 caller about whether he or she believed that the 911 call was confidential, or evidence that BCEHS provided the 911 caller with any express assurances of confidentiality at the time the information was supplied. However, in light of BCEHS' evidence that it treats this type of information as confidential and previous orders regarding 911 calls,[41] I find that the withheld information was supplied in confidence. However, as discussed below in further detail, in my view this confidentiality is diminished with respect to disclosing the identity of the 911 caller to the applicant given the specific circumstances of this case. Therefore, I attribute less weight to s. 22(2)(f) in this case than I would in other cases involving 911 calls.

---

[38] For example, after commencing a John Doe action, the applicant would presumably need to get a *Norwich* order. She would then presumably need an order substituting the name of the 911 caller as the named defendant in the action. I also note that more court resources will be used.

[39] The applicant could decide to not sue the 911 caller after learning his or her identity and/or corresponding with the 911 caller for a number of reasons (*i.e.*, settlement, emotional healing/closure, the 911 caller is impecunious, etc.).

[40] BCEHS is citing Order F13-12, 2013 BCIPC No. 15 (CanLII) at para. 20, which quotes Investigation Report F97-010:http://www.oipc.bc.ca/investigation-reports/1257 at p. 3.

[41] Order F13-12, 2013 BCIPC No. 15 (CanLII) at para. 20, which quotes Investigation Report F97-010:http://www.oipc.bc.ca/investigation-reports/1257 at p. 3.

The Applicant's Knowledge / Connection to the Information

[70] In my view, the applicant's existing knowledge and connection to the contents of the transcript are relevant factors to consider in this case. The applicant was present during the 911 call, although she did not know what was said at the time because she was, at best, semi-conscious. However, the applicant was involved in the accident, so she already knows the details of the accident such as its location, that the 911 caller was cycling downhill fast, the gender of the caller, her own injuries, etc. Further, most of the information contained in the transcript is as much, if not more, about the applicant than it is about the 911 caller. Moreover, the applicant already has nearly the entire contents of the transcript, including the part where the 911 caller admits how fast he or she was travelling. In my view, the applicant's knowledge of, and connection to, the transcript information favours disclosure of this information.

Other Relevant Circumstances

[71] There are two other circumstances that warrant consideration in this s. 22(2) analysis. They are BCEHS' submission that disclosing the identity of 911 callers may be a barrier for the public to make 911 calls, and the fact that the 911 caller in this specific case was involved in a bicycle accident with the applicant.

[72] BCEHS' submits that the identity of 911 callers must be preserved to maintain public trust in the confidentiality of emergency calls, so individuals are not deterred from seeking emergency assistance for themselves or others. In other words, BCEHS submits that disclosure will have a "chilling effect".

[73] This is not the first time that a public body has argued in a FOI context that the disclosure of information in a 911 transcript will have a chilling effect. For instance, this factor was given significant weight in Ontario Order MO-2677,[42] in which the adjudicator determined that Ontario's equivalent of BC's s. 22 applied to the name and cell phone number of a Good Samaritan who called 911 after seeing someone slip and fall.[43] In that case, the person who fell commenced legal proceedings and wanted to know the identity of the Good Samaritan to help her prepare for trial. In that case, Adjudicator Morrow stated:

> [48] In addition, I note that the city has also raised as a factor weighing in favour of privacy protection the impact that disclosure in this case could have on the willingness of members of the public to call 911 in the future in the event of an emergency. I concur with the city that if it cannot provide an

[42] Order MO-2677, 2011 CanLII 83491 (ON IPC).

[43] I note that the adjudicator in Ontario Order MO-2677 also gave significant weight to the "significant personal distress" disclosure of the Good Samaritan's identity could have reasonably been expected to cause the Good Samaritan. This finding was based on *in camera* evidence from the Good Samaritan.

> assurance of confidentiality to members of the public when they step forward to assist as Good Samaritans, members of the public will be less inclined to do so in the future. I agree that since the 911 service relies on the general public to assist in times of emergency disclosure in this case could have a significant chilling effect on the willingness of the public to step forward in the future. Accordingly, I also give significant weight to this factor in favour of privacy protection.[44]

[74] In my view, disclosing the identity of 911 callers in some contexts could impact the willingness of the public to call 911. However, this inquiry relates to the discrete issue of an injured person involved in a bike accident seeking the identity of the other person involved in the accident.

[75] In my view, there is a clear public interest in having parties involved in bicycle or other vehicle accidents exchange contact information and assist injured parties (*i.e.*, provide physical assistance, call 911, etc.). A person's involvement in an accident provides a moral – if not legal – obligation that is elevated above that of a bystander who merely witnesses what takes place. In my view, this public interest diminishes an individual's expectation of privacy regarding their contact information vis-à-vis the other people involved in the accident. This principle is codified for vehicle accidents in both Federal and Provincial legislation that oblige people involved in accidents to assist injured parties and exchange contact information. This legislation criminalizes failing to provide assistance to injured parties or exchange contact information with the intent to escape civil or criminal liability. For example, s. 252 of the *Criminal Code* states in part:

> Failure to stop at scene of accident
>
> 252 (1) Every person commits an offence who has the care, charge or control of a vehicle, vessel or aircraft that is involved in an accident with
>
> (a) another person,
>
> (b) a vehicle, vessel or aircraft, or
>
> (c) in the case of a vehicle, cattle in the charge of another person,
>
> and with intent to escape civil or criminal liability fails to stop the vehicle, vessel or, if possible, the aircraft, **give his or her name and address and, where any person has been injured or appears to require assistance, offer assistance**.
>
> …
>
> (1.2) Every person who commits an offence under subsection (1) knowing that bodily harm has been caused to another person involved in the accident

[44] Order MO-2677, 2011 CanLII 83491 (ON IPC) at para. 48.

> is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.
>
> [bold and underlining added][45]

[76] For accidents on roads or sidewalks, British Columbia's *Motor Vehicle Act* also contains provisions requiring motor vehicle drivers and bicyclists to remain at the scene of an accident, render all possible assistance, and to provide contact information to anyone sustaining loss. Section 183(9), which is the provision relating to cyclists, states:

> (9) If an accident occurs by which a person or property is injured, directly or indirectly, owing to the presence or operation of a cycle on a highway or a sidewalk, the person in charge of the cycle must
>
> (a) remain at or immediately return to the scene of the accident,
>
> (b) render all possible assistance, and
>
> (c) give to anyone sustaining loss or injury his or her name and address and the name and address of the owner of the cycle, and if the cycle has been licensed and registered, the licence or registration number of the cycle.

[77] In my view, the above legislation reflects a policy choice by both Federal and Provincial Legislatures to impose duties that require individuals involved in vehicle accidents to assist others and exchange contact information, and that this duty overrides the individual's privacy rights to their contact information. In this case, it appears that s. 183(9) of the *Motor Vehicle Act* may not apply because the accident occurred on a suburban trial rather than a road or sidewalk. However, in my view this distinction does not nullify the fact that people involved in accidents have a diminished expectation of privacy in relation to the people involved in the accident.

[78] I am not persuaded that disclosure in these circumstances could reasonably be expected to deter people from calling 911 in similar types of situations in the future. I doubt that a person involved in an accident such as the one outlined here would consider not calling 911 out of a concern that his or her identity may be disclosed in a future FOI request to someone who was part of the accident. I expect that most people involved in an accident where someone is seriously injured would reflexively call 911, rather than consider their own interests before making a call for assistance. However, even if a person contemplates his or her own interests before deciding to call 911, in my view such a person is much more likely to focus on the consequences of involving police in the event the person may have contravened the *Motor Vehicle Act* or

[45] For clarity, I am not in any way suggesting that s. 252 of the *Criminal Code* applies in this case, or opining about whether word "vehicle" in s. 252 includes bicycles.

Criminal Code, than to focus on an invasion of their privacy from disclosure of their identity to others involved in the accident. It seems highly unlikely that someone would be focusing on their privacy interests at such a moment. Further, even if the person does consider their own privacy interests and is worried that the other person(s) involved in the accident will learn his or her identity, in my view it is not reasonable to expect that this would result in the person deciding not to call 911. This is particularly the case considering the moral – and possibly legal – obligations all of us have to seek assistance for the injured and/or to provide our contact information in such circumstances.

[79] In addition to not being satisfied that disclosure of the information at issue in this case may deter people from calling 911 in similar cases, I am also not persuaded that disclosure of the identity information here may deter people from calling 911 in other contexts. There is no evidence before me that BCEHS promises confidentiality, or that disclosure in this case would undermine expectations of confidentiality that contribute to people calling 911. Further, I am not otherwise swayed by BCEHS' concern that public assurance in the confidentiality of 911 calls will be undermined if the information in dispute in this particular case is disclosed.

[80] As previously stated, I am only dealing with the very specific circumstances of this inquiry (*i.e.* someone who was injured in a bicycle accident is seeking the disclosure of information that reveals the identity of someone else involved in the accident). The findings in this case are not a blanket statement that s. 22 of FIPPA does not apply to the identity of 911 callers. In my view, this inquiry is limited to a distinctive circumstance, and disclosure in this case will not change the public's understanding of the confidentiality of their calls, or signal to the public that the identities of 911 callers will ordinarily be revealed.

[81] For the above reasons, I am not persuaded that disclosure of the information in this case will deter people from calling 911. Therefore, I find that this argument does not favour withholding the 911 caller's identity information.

Section 22(1) Conclusions

[82] The issue under s. 22(1) of FIPPA is whether disclosure of the withheld information would be an unreasonable invasion of the personal privacy of a third party. In this case, the withheld information relates to the 911 caller's identity, and disclosure would reveal the identity of this person, both as the person who made the statements contained in the 911 transcript and as the person who was involved in the accident with the applicant. This information is inextricably linked because both facts are revealed by disclosure of the same information.

[83] I have determined that the withheld information is personal information, and that neither s. 22(4) nor s. 22(3) apply.

[84] In my view, s. 22(2)(f) favours withholding the personal information because it was supplied confidence. However, the 911 caller has a diminished expectation of privacy regarding the disclosure of his or her identity to the applicant given the caller's involvement in the accident. The applicant knows and is connected to the information in the transcript, which is the 911 caller's factual account of an accident and the applicant's injuries, and this weighs in favour of disclosure. Further, in my view, s. 22(2)(c) applies regarding disclosure of this information, as the 911 caller's identity is relevant to a fair determination of the applicant's rights. Moreover, given the specific circumstances of this case, I am not satisfied that disclosure here will have a chilling effect and deter other people from calling 911.

[85] Ultimately, this case involves the identity of a 911 caller who was involved in a bicycle accident that seriously injured the applicant. Presumably, the 911 caller would prefer that his or her identity not be disclosed to decrease the possibility of being contacted or sued by the applicant. While the identities of 911 callers must be withheld under s. 22 in most situations, after considering all the relevant factors, in my view this case is an exception. In my view, to the extent that disclosing the identity of the 911 caller to the applicant is an invasion of the 911 caller's privacy, that invasion is reasonable.

[86] For the above reasons, I find that disclosing the withheld information would not be an unreasonable invasion of the privacy of the 911 caller under s. 22.

CONCLUSION

[87] For the reasons given above, under s. 58 of FIPPA, I order that BCEHS is required to give the applicant access to the withheld information by **August 30, 2016**, pursuant to s. 59 of FIPPA. BCEHS must copy the OIPC Registrar of Inquiries on its cover letter to the applicant.

July 18, 2016

ORIGINAL SIGNED BY

Ross Alexander, Adjudicator

OIPC File No.: F14-59126