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Order F17-01

REGIONAL DISTRICT OF NANAIMO

Elizabeth Barker
Senior Adjudicator

January 9, 2017

CanLII Cite: 2017 BCIPC 01
Quicklaw Cite: [2017] B.C.I.P.C.D. No. 01

Summary: An employee of the Regional District of Nanaimo requested access to any records containing his name. The Regional District provided records but it refused to disclose some information under ss. 12(1) (cabinet confidences), 13 (policy advice or recommendations), 17 (harm to the financial or economic interests of a public body), 21 (harm to third party business interests) and 22 (harm to personal privacy) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator confirmed the Regional District's decision regarding s. 13 but found that it was not authorized or required to refuse access to information under ss. 12(1), 17 or 21. The adjudicator also found that the Regional District is only required to refuse to give the applicant access to a portion of the information being withheld under s. 22.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 13, 17, 21 and 22.

Authorities Considered: B.C.: Order 00-13, 2000 CanLII 6591 (BC IPC); Order 00-53, 2000 CanLII 14418 (BC IPC); Order 01-53, 2001 CanLII 21607 (BC IPC); Order 02-36, 2002 CanLII 42470 (BC IPC); Order 02-38, 2002 CanLII 42472 (BCIPC); Order 03-02, 2003 CanLII 49166 (BC IPC); Order 03-15, 2003 CanLII 49185 (BC IPC); Order 03-35, 2003 CanLII 49214 (BCIPC; Order 04-04, 2004 CanLII 34258 (BC IPC); Order 04-05, 2004 CanLII 34259 (BC IPC); Order F06-11, 2006 CanLII 25571; Order F07-17, 2007 CanLII 35478 (BC IPC); Order F08-10, 2008 CanLII 30212 (BCIPC); Order F08-22, 2008 CanLII 70316 (BC IPC); Order F09-13, 2009 CanLII 42409 (BC IPC); Order F10-10, 2010 BCIPC 17 (CanLII); Order F10-15, 2010 BCIPC 24 (CanLII); Order F10-21, 2010 BCIPC 32 (CanLII); Order F10-39, 2010 CanLII 77325 (BC IPC); F11-14, 2011 BCIPC 19 (CanLII); Order F13-27, 2013 BCIPC 36 (CanLII); Order F14-38, 2014 BCIPC 41 (CanLII); Order F14-41, 2014 BCIPC 44 (CanLII); Order F14-47, 2014 BCIPC 51

(CanLII); Order F15-17, 2015 BCIPC 18 (CanLII); Order F16-03, 2016 BCIPC 3 (CanLII); Order F16-19, 2016 BCIPC 21 (CanLII); Order F16-32, 2016 BCIPC 35 (CanLII) ;

Cases Considered: *John Doe v. Ontario (Finance*), 2014 SCC 36; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner),* 2012 BCSC 875.

INTRODUCTION

[1] An employee of the Regional District of Nanaimo ("RDN") made a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for access to any records containing his name.[1] RDN provided the applicant with the records responsive to his request, but it refused to disclose some information in those records under s. 12(1) (cabinet confidences), s. 13 (policy advice or recommendations), s. 14 (legal advice), s. 21 (harm to third party business interests) and s. 22 (harm to third party personal privacy) of FIPPA.

[2] The applicant asked the Office of the Information and Privacy Commissioner ("OIPC") to review RDN's decision. During mediation, the parties resolved the s. 14 issue and RDN disclosed additional information to the applicant. However, the applicant requested that the remaining issues proceed to inquiry. At the outset of the inquiry, RDN stated that it was also refusing access to some information under s. 17 (harm to public body's financial or economic interests), and that issue was added into the inquiry.

[3] The third party affected by s. 21 is the applicant's union, the Canadian Union of Public Employees, Local 401 ("CUPE"). CUPE was given the opportunity to make an inquiry submission regarding s. 21, but it chose not to do so.

ISSUES

[4] The issues to be decided in this inquiry are as follows:

1. Is RDN authorized to refuse to disclose the information at issue under ss. 13 and 17 of FIPPA?

2. Is RDN required to refuse to disclose the information at issue under ss. 12(1), 21 and 22 of FIPPA?

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[1] RDN provides regional governance and services for several of Vancouver Island's central east coast communities, including the municipality of Nanaimo. RDN is a "local government body" for the purposes of FIPPA.

[5] Section 57 of FIPPA governs the burden of proof in an inquiry. RDN has the burden of proving that the applicant has no right of access to the information it is refusing to disclose under ss. 12(1), 13, 17 and 21. However, the applicant has the burden of proving that disclosure of any personal information in the requested records would not be an unreasonable invasion of third party personal privacy under s. 22.

DISCUSSION

[6] **Information in Dispute** – The information in dispute is contained in emails, two letters (one with its envelope) from members of the public complaining to RDN about the applicant, and two pages of notes made by RDN staff recording their discussions with the applicant about his use of work vehicles.

[7] **Cabinet Confidences -** RDN is withholding part of an undated email under s. 12(1).[2] Section 12(1) states:

> 12(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

[8] RDN submits: "This record was redacted under Section 12 in full accordance with the request of a third-party. As such, there is a presumption of privacy under Section 12(1), requiring the RDN to withhold information."[3] RDN also cites Order F16-03 in support of its decision to withhold this information.[4] The applicant does not respond to RDN's submissions regarding this exception.

[9] Section 12(1) of FIPPA requires public bodies to withhold information that would reveal the substance of deliberations of the Executive Council (also known as Cabinet) and any of its committees.[5] I have reviewed the records, and it is clear they do not pertain in any way to the deliberations of Cabinet or any of its committees. RDN does not explain or provide evidence to support its assertion that s. 12(1) applies. Therefore, I find that RDN has not established that it must withhold this information under s. 12(1).

[10] I have also considered RDN's submission that Order F16-03 supports its decision to refuse to disclose the information under s. 12(1). I do not find Order

[2] This information is on p. 54 of the records. RDN has marked on the record that the information is being withheld under s. 12(1) specifically.
[3] RDN's initial submission, para. 24. In para 2 of its reply submissions, RDN identifies the third party it references in the quote above as the City of Nanaimo.
[4] RDN reply submission, para. 5. Order F16-03, 2016 BCIPC 3 (CanLII).
[5] The committees designated under s. 12(5) of FIPPA are listed in the *Committees of the Executive Council Regulation*.

F16-03 persuasive because it dealt with a refusal to disclose information under s. 12(3)(b), which is not the same exception as s. 12(1). Section 12(3)(b) of FIPPA authorizes local public bodies to withhold information that would reveal the substance of their deliberations during *in camera* meetings, and RDN has provided no evidence or explanation regarding how it might apply in the present case.[6]

[11] **Advice or Recommendations** - Section 13 authorizes the head of a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister, subject to certain exceptions. The purpose of s. 13 is to allow full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny.[7]

[12] Section 13 states in part as follows:

> 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
>
> (2) The head of a public body must not refuse to disclose under subsection (1)
>
> (a) any factual material,…

[13] Section 13 has been the subject of many orders, which have held that s.13 applies not only when disclosure of the information would directly reveal advice and recommendations, but also when it would allow accurate inferences about the advice or recommendations.[8]

[14] The process for determining whether s. 13 applies to information involves two stages.[9] The first is to determine whether the disclosure of the information would reveal advice or recommendations developed by or for the public body. If so, then it is necessary to consider whether the information falls within any of the categories listed in s. 13(2). If it does, the public body must not refuse to disclose the information under s. 13(1).

[15] RDN is withholding some information, which it says are drafts and recommendations for RDN's response to a third party. RDN also says, "The records are withheld under Section 13(1) are draft comments by the RDN to a

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[6] See Order F13-10, 2013 BCIPC 11 (CanLII) at para. 8 for the three part test for s. 12(3)(b).
[7] *John Doe v. Ontario (Finance*), 2014 SCC 36 at para. 45 and *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII), para. 105.
[8] For example: Order 02-38, 2002 CanLII 42472 (BCIPC); Order F10-15, 2010 BCIPC 24 (CanLII).
[9] Order F07-17, 2007 CanLII 35478 (BC IPC), para 18.

third-party, and discussions by the RDN about the comments. Final versions of the comments have been disclosed to the applicant, as well as portions of the drafts."[10]

[16] The applicant's submits that even if the final version of the information has been disclosed, the earlier drafts must also be disclosed and withholding the information is unreasonable.

[17] The information withheld under s. 13 is in a two page email exchange between RDN staff. The email chain commences with a staff member proposing wording for an email and requesting that the others give their opinions and comments on what she suggests. The email chain includes the advice the others provided about the wording and what they think RDN should communicate about the matter addressed in the email.

[18] In my view, the withheld information reveals the advice and recommendations of RDN staff about what RDN should say in the email, so s. 13(1) applies. I also find that this information does not fall into any of the categories of information listed in s. 13(2). In conclusion, RDN has established that it may refuse to disclose this information to the applicant under s. 13(1).

[19] **Harm to Financial or Economic Interests -** RDN is withholding one sentence in an email chain under s. 17(1)(e).[11] Section 17(1)(e) states:

> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
>
> …
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia;…

[20] Previous orders have noted that ss. 17(1)(a) through (f) are examples of information the disclosure of which may result in harm under s. 17(1). Information that does not fit in the listed paragraphs may still fall under the opening clause of s. 17(1).[12]

[21] The standard of proof under s. 17(1) is whether disclosure of the information could reasonably be expected to result in the specified harm. The Supreme Court of Canada has described this standard as "a reasonable expectation of probable harm." It is a middle ground between that which is

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[10] RDN's initial submissions, para. 23

[11] Page 28 of the records.

[12] See for example, Orders F08-22, 2008 CanLII 70316 (BC IPC); F09-13, 2009 CanLII 42409 (BC IPC); F10-39, 2010 CanLII 77325 (BC IPC); F11-14, 2011 BCIPC 19 (CanLII).

probable and that which is merely possible. A public body must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to meet the standard. The determination of whether the standard of proof has been met is contextual, and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences."[13]

[22] Further, the B.C. Supreme Court confirmed that it is the release of the information itself that must give rise to a reasonable expectation of harm, and that the burden rests with the public body to establish that the disclosure of the information in question could result in the identified harm.[14]

[23] RDN's submission regarding s. 17 is as follows: "The item redacted under Section 1(e) is contained in a forwarded reply to an email to the applicant. The reply email is not about the applicant, or responsive to his request, however the RDN has disclosed a portion of the record."[15] The applicant makes no submission regarding s. 17.

[24] It is not apparent how disclosure of the withheld sentence could reasonably be expected to cause any of the harms listed in s. 17(1). RDN does not elaborate on its submission quoted above. In particular, I cannot see how disclosure of this one sentence would cause harm under s. 17(1) because this same information has already been disclosed to the applicant elsewhere in the records. Further, the information is innocuous and historical, and it is improbable to me that anyone in RDN's unionized workforce does not already know this information.

[25] In conclusion, I find that RDN has not established that disclosure of the withheld information could reasonably be expected to cause harm pursuant to s. 17(1).

[26] **Harm to Third Party Business Interests -** Section 21 requires public bodies to withhold information the disclosure of which would harm the business interests of a third party, which in this case is CUPE. Section 21 says as follows:

> 21(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal

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[13] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, at para. 54, which cites *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3.
[14] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner),* 2012 BCSC 875 at para. 43.
[15] RDN's initial submissions, para. 22.

(i) trade secrets of a third party, or

(ii) … labour relations…information of or about a third party,

(b) that is supplied, implicitly or explicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization,

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[27] RDN is relying on s. 21 to refuse the applicant access to parts of emails on three pages. One excerpt is in an email between CUPE representatives (on page 10). The balance are in an exchange of emails between a CUPE representative and an RDN employee (on pages 12-13). The entirety of RDN's submissions concerning the application of s. 21 to these excerpts is as follows:

> As confidential emails about third party business, the records meet tests under subsections (1)(a) and (b), and there is a presumption of harm under subsection (1)(c).[16]
>
> …
>
> This information includes both trade secrets and labour relations of the union, is supplied in confidence via email, and, if disclosed, could potentially result in harm under all sub-sections (1)(c)((i), (ii), (iii), and (iv). It is also not part of materials that are available publicly. As a bargaining unit and employee advocate, the union must have confidence that its staff can express personal positions directly to the employer, without concern of public disclosure. Union staff are appointed to conduct this business on behalf of union members, with the expectation that they report back to the union or individual members. The RDN is not in a position to disclose confidential information obtained through these discussions.[17]

[28] The applicant submits that RDN "should be held to the strict proof" that s. 21 applies.[18] He adds that CUPE did not respond to RDN when RDN gave it the opportunity to give its views on disclosure of the requested information.[19]

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[16] RDN's initial submissions, para. 21.

[17] RDN's reply, para. 6.

[18] Applicant's submissions, p. 2.

[19] He is referring to RDN's statement that before making its decision regarding the access request, it asked CUPE for its views regarding the applicant of s. 21 to the records.

Analysis, s. 21

[29] The principles of s. 21 are well established. In order to properly withhold information under s. 21, in this case RDN must establish the following three elements:

1. Disclosure would reveal the type of information in s. 21(1)(a) that RDN alleges (i.e., CUPE's trade secrets and/or the labour relations information of or about CUPE);
2. The information was supplied, explicitly or implicitly, in confidence, pursuant to s. 21(1)(b); and
3. Disclosure of the information could reasonably be expected to cause the type of harm in s. 21(1)(c) that RDN alleges would occur.

Trade secrets, s. 21(1)(a)(i)

[30] RDN submits that the information in dispute under s. 21 would reveal CUPE's trade secrets. Schedule 1 of FIPPA defines a trade secret as follows:

> "trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process, that
> (a) is used, or may be used, in business or for any commercial advantage,
> (b) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use,
> (c) is the subject of reasonable efforts to prevent it from becoming generally known, and
> (d) the disclosure of which would result in harm or improper benefit.

[31] RDN provides no submission or evidence to explain how the information in dispute would reveal CUPE's trade secrets.[20] I have considered the withheld information in light of the definition above, and in my view, the information does not reference anything that could even remotely be described as a trade secret. Therefore, I find that RDN has not established that disclosure would reveal CUPE's trade secrets.

Labour relations information, s. 21(1)(a)(ii)

[32] RDN also submits that the information in dispute reveals labour relations information of or about CUPE. The term "labour relations" is not defined in

[20] The applicant makes no submissions about whether the information is a trade secret or labour relations information.

FIPPA, however, previous B.C. Orders[21] have found the following types of information to be labour relations information:

- Information respecting the collective bargaining relationship between an employer and its employees and their union.
- Information related to an issue or dispute, such as a grievance, arising within the context of the collective bargaining relationship and collective agreement.

[33] In this case, the excerpts withheld under s. 21 are about such matters. The emails are discussions between CUPE representatives and between CUPE representatives and RDN management. CUPE is clearly acting as the union representative for RDN employees within the context of the relationship that is governed by the collective agreement. The excerpts reveal specifics of CUPE's representation of employees who are pursuing issues and grievances against RDN. Therefore, I find that disclosing this information would reveal labour relations information of or about CUPE, so s. 21(1)(a)(ii) applies.

Supplied in confidence, s. 21(1)(b)

[34] For s. 21(1)(b) to apply, the information must have been supplied, either implicitly or explicitly, in confidence. This is a two-part analysis. The first step is to determine whether the information was "supplied" to the public body. The second step is to determine whether the information was supplied "implicitly or explicitly in confidence."

[35] RDN provides no evidence or explanation to support its assertion that the information was supplied for the purpose of s. 21(1)(b). It also does not say who the individuals are who are communicating in the emails at issue. [22]

[36] I can tell, however, from the context and the sender's email address that the information being withheld on page 10, is a communication between CUPE representatives. RDN does not explain how this email containing internal CUPE communication came to be in the custody or control of RDN. I suspect that one of the CUPE representatives involved in the email exchange was a shop steward in RDN's work place and inadvertently forwarded it when responding to his employer's call for records responsive to the FIPPA access request. In my view, that mode of gaining access does not equate to the information having been "supplied" to RDN for the purposes of s. 21(1)(b). Even if I am wrong about how

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[21] Order 04-04, 2004 CanLII 34258 (BC IPC) and Order 04-05, 2004 CanLII 34259 (BC IPC) (on judicial review, the OIPC's s. 21 decision found to be reasonable: *BC Teachers' Federation, Nanaimo District Teachers Association et al. v. Information and Privacy Commissioner (B.C.) et al*., 2006 BCSD 131); Order F08-10, 2008 CanLII 30212 (BCIPC); Order F13-27, 2013 BCIPC 36 (CanLII).

[22] The applicant also makes no submission about whether the information was "supplied."

RDN obtained this email, I am still not satisfied that it was "supplied" pursuant to s. 21(1)(b) because RDN provides no evidence or explanation to support its assertion on that point. Therefore, I find that s. 21(1)(b) does not apply to the information being withheld on page 10 of the records.

[37] The balance of the information withheld under s. 21 is in an exchange of emails between a CUPE representative and an RDN employee. This is evident from their email addresses. The CUPE representative gives the RDN employee his views on RDN's workplace practices. I am satisfied based on its context and content, that the withheld information on pages 12-13 of the records was "supplied" for the purposes of s. 21(1)(b).

[38] The next step in the analysis is to determine if the information that I find was supplied was supplied "implicitly or explicitly in confidence." I have considered RDN's submissions quoted above.

[39] There is nothing explicitly stated in the emails about confidentiality. However, based on their content and context, I am satisfied that this is the type of information that would normally be communicated between a union and employer in confidence. It consists of CUPE's forthright views about RDN's workplace practices. Further, there is nothing to suggest that CUPE sent the emails to anyone other than RDN. There is also no indication that the emails contain information that is in the public domain or otherwise available. Therefore, I am satisfied that the information being withheld under s. 21 on pages 12-13 was supplied "in confidence" for the purposes of s. 21(1)(b).

Reasonable Expectation of Harm, s. 21(1)(c)

[40] It is only necessary for me to consider whether disclosure of information that was supplied in confidence could reasonably be expected to result in harm under s. 21(1)(c). However, for completeness, I will consider all of the information RDN withheld under s. 21.

[41] The onus is on RDN to establish that disclosure of the information in question could reasonably be expected to result in the professed harm. As with s. 17, the standard of proof for s. 21(1)(c) is whether disclosure of the information could reasonably be expected to result in the specified harm.[23]

[42] Other than its assertion that disclosure will result in the harms set out in s. 21(1)(c), RDN provides no information about this. A similar situation arose in Order 03-02, a case involving the application of s. 17(1) and s. 21(1) to draft marketing agreements. Former Commissioner Loukidelis found that no party had provided any evidentiary basis to support the application of s. 21(1) and,

[23] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, at para. 54.

consequently, it did not apply. He affirmed that a public body's failure to provide evidence to establish the application of s. 21(1) could be fatal to its case.[24]

[43] All three parts of the s. 21(1) test must be established before the exception to disclosure applies. RDN has provided no supporting submissions or evidence to explain how disclosure could reasonably be expected to result in the s. 21(1)(c) harms. Moreover, it is not evident based on the content and context of the records themselves. Consequently, RDN has not satisfied me that disclosure of any of the information being withheld under s. 21(1) could reasonably be expected to result in harm under s. 21(1)(c).

Summary and conclusion, s. 21

[44] I find that disclosing the information being withheld under s. 21(1) would reveal labour relations information of or about CUPE, so s. 21(1)(a)(ii) applies. RDN has proven that some of the withheld information was supplied in confidence under s. 21(1)(b). However, it has not established that disclosing any of the information could reasonably be expected to result in harm under ss. 21(1)(c). Therefore, I find that RDN has not proven that the applicant has no right of access to the information being withheld under s. 21(1).

[45] **Disclosure Harmful to Personal Privacy -** RDN is refusing to disclose some information to the applicant on the basis that disclosure would be an unreasonable invasion of third party personal privacy under s. 22. Numerous orders have considered the application of s. 22, and I will apply those same principles here.[25]

Personal information

[46] The first step in any s. 22 analysis is to determine if the information is personal information. Personal information is defined in FIPPA as “recorded information about an identifiable individual other than contact information.” Contact information is defined 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”.[26]

[47] RDN submits that the information in dispute is personal information. The applicant says that RDN can only withhold information that would directly identify an individual.

[24] Order 03-02, 2003 CanLII 49166 (BC IPC) at para. 120.
[25] For example, Order 01-53, 2001 CanLII 21607 (BC IPC) at p. 7.
[26] See Schedule 1 of FIPPA for these definitions.

[48] I find that most of the information RDN is withholding under s. 22 is the personal information of third parties. It consists of names and other information and comments about identifiable individuals. The third party personal information in one email chain is also simultaneously the applicant's personal information because it is the opinions and comments of two third parties' (their names have already been disclosed) about the applicant and his situation.[27] Previous orders have also found that opinions are the opinion-giver's personal information as well as the personal information of the individual the opinion is about.[28]

[49] However, there are several instances where information that is being withheld under s. 22 is not personal information because it is "contact information" as defined in FIPPA.[29] The contact information appears in emails that are clearly about mundane work related matters, and it consists of names, job titles, phone numbers and email and mailing addresses. This information is obviously being exchanged in these emails in order to enable the individuals to reach each other at their respective places of business for business purposes. Section 22 applies only to personal information, so RDN may not refuse to disclose this contact information to the applicant under s. 22.

Section 22(4)

[50] The next step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4). If it does, then disclosure would not be an unreasonable invasion of personal privacy. RDN submits that none of the subsections in s. 22(4) apply to the personal information in this case. The applicant makes no submission on this point.

[51] For the reasons that follow, I find that s. 22(4)(e) applies to some of the personal information. That provisions states:

> 22(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (e) the information is about the 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,

[52] Some of the personal information that I find falls under s. 22(4)(e) is in an email RDN sent to the Environmental Operators Certification Program to tell it

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[27] On p. 2 of the records. The City of Nanaimo manager and a City of Nanaimo councillor have been identified as the individuals making these comments/opinions.

[28] Order F14-47, 2014 BCIPC 51 (CanLII) at para. 14; Order F16-32, 2016 BCIPC 35 (CanLII) at para. 51; Order F16-19, 2016 BCIPC 21 (CanLII) at para. 23.

[29] Most of the information on pp. 21-26 and 30 and some information on pp. 38-39 is contact information.

which RDN employee is linked with which particular pollution control centre.[30] RDN withheld the names of the employees and their certification number and level. In my view, this is information about the employees' positions and functions, so s. 22(4)(e) applies.

[53] I also find that s. 22(4)(e) applies where an employee's name appears in the greeting or signature line of emails about routine business matters, and when an employee's name appears in the context of emails about scheduling work meetings and the assignment of RDN vehicles and cellphones.[31] The context of this personal information plays a significant role in determining whether s. 22(4)(e) applies. Section 22(4)(e) covers personal information that is about an individual's job duties in the ordinary course of work-related activities, namely objective factual information and statements about what he or she did or said in the normal course of discharging his or her job duties.[32] It is evident that the personal information in these specific emails is about the normal work functions and activities of the employees and it does not relate to a workplace investigation or disciplinary matter. Thus, I find that s. 22(4)(e) applies.

[54] Disclosure of the personal information, to which I find s. 22(4)(e) applies, would not be an unreasonable invasion of third party personal privacy. Therefore, RDN may not refuse to disclose it to the applicant under s. 22(1).

Presumptions and relevant circumstances

[55] The third step in the s. 22 analysis is to determine whether any of the s. 22(3) presumptions apply to the balance of the personal information. If a presumption applies, disclosure of the personal information is presumed to be an unreasonable invasion of third party privacy. The following presumptions are relevant in this case:

> 22(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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> (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
>
> (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,
>
> ...
>
> (d) the personal information relates to employment, occupational or educational history,
>
> …

[30] This information is on pp. 40-41 of the records.
[31] It is on pp. 21, 23, 27, 30, 31, 40, 43 and 47 of the records.
[32] Order 01-53, 2001 CanLII 21607 (BC IPC) at paras. 40-41.

(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,

…

(h) the disclosure could reasonably be expected to reveal the content of a personal recommendation or evaluation, a character reference or a personnel evaluation supplied by the third party in confidence and the applicant could reasonably be expected to know the identity of the third party,

[56] The fourth step in the s. 22 analysis is to consider the impact of disclosure of the personal information in light of all relevant circumstances, including those in s. 22(2). It is at this step that any presumptions may be rebutted. The factors listed in s. 22(2) that play a role in this case are as follows:

22(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

(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,

…

(f) the personal information has been supplied in confidence,

…

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

Parties' submissions

[57] RDN submits that the ss. 22(3)(d),(f) and (h) presumptions apply and are not rebutted by any factors in s. 22(2).[33] It also says that, in particular, it considered s. 22(2)(h).[34] The applicant says nothing about the presumptions or relevant circumstances.

[58] RDN also cites Orders F14-41[35] and F16-03[36] in support of its position, but it does not elaborate. I have considered those orders, but I do not find them persuasive, given that they did not involve the same records, evidence or submissions as in the present case.

[33] RDN initial submissions, para. 11 and 13.
[34] RDN's initial submissions, para. 13. It does not elaborate on this submission.
[35] Order F14-41, 2014 BCIPC 44 (CanLII).
[36] F16-03, 2016 BCIPC 3 (CanLII).

Analysis, s. 22

[59] The personal information in dispute is varied in this case, so I will deal with each type in turn below.

[60] Medical treatment and employment history - I find that the s. 22(3)(a) presumption applies to information in one email because it relates exclusively to a third party's medical condition.[37] In addition, I find that s. 22(3)(d) applies to several employee names and details of investigations into their work performance and related disciplinary matters.[38] I also find that s. 22(3)(d) applies to information about third parties' leave entitlement and unused vacation time and workplace issues related to those matters.[39] My findings are consistent with past orders, which have found that such information relates to third party employment history so s. 22(3)(d) applies.[40]

[61] I have considered whether disclosing the details of such personnel matters would be desirable for the purposes of subjecting RDN's activities to public scrutiny (s. 22(2)(a)), and I find that it would not. This information is also the type of sensitive personal information that is ordinarily supplied and/or held in confidence (s. 22(2)(f)), which I find is a circumstances that weighs against disclosure. Further, disclosing the information about health conditions and/or restrictions, as well as disciplinary matters, has the potential to unfairly damage the reputation of the people referred to (s. 22(2)(h)). That is because the records do not include the "other side of the story", which is needed to counter-balance any negative impression given by this specific information.

[62] In conclusion, having considered all relevant circumstances, I find that the ss. 22(3)(a) and (d) presumptions, which apply to the personal information described above, have not been rebutted. Therefore, disclosing this information would be an unreasonable invasion of third party personal privacy under s. 22(1).

[63] Dog attack - RDN is withholding information that would identify an individual involved in an attack by the applicant's dogs.[41] The information appears in an email exchange between two RDN employees discussing an investigation of the attack. Other than making a notation on the record that the s. 22(3)(h) presumption applies, RDN says nothing about this information. I find that s. 22(3)(h) does not apply. However, I find that s. 22(3)(b) does because it appears from my review of the records that the third party's identity was obtained

[37] Page 45 of the records.
[38] Pages 13, 18 and 19 of the records.
[39] Pages 29 and 38 of the records.
[40] Disciplinary matters: Order 00-13, 2000 CanLII 6591 (BC IPC); Order 01-53 2001 CanLII 21607 (BC IPC); Order F10-21, 2010 BCIPC 32 (CanLII). Leave entitlement: Order 00-53, 2000 CanLII 14418 (BC IPC); Order 02-36, 2002 CanLII 42470 (BC IPC); Order F15-17, 2015 BCIPC 18 (CanLII).
[41] Page 44 of the records.

during the course of a bylaw investigation. Previous orders have also found that s. 22(3)(b) applies to personal information gathered during bylaw investigations.[42]

[64] I have also considered whether the third party supplied his name in confidence (s. 22(2)(f)). RDN provided no information about this, but I note that more often than not individuals expect confidence when complaining to a public body about someone's wrong-doing, at least at the initial stages of an investigation. There is no indication that the applicant knows this complainant's identity. I have also considered the fact that the applicant has said nothing about this record or why he wants access to this information almost eight years after the event. Considering all the relevant circumstances, I believe that the balance falls in favour of protecting the privacy of the third party in this case.

[65] In summary, I find that the s. 22(3)(b) presumption applies to this information and it has not been rebutted. Thus, disclosing the identity of this individual would be an unreasonable invasion of the third party's personal privacy under s. 22(1).

[66] Work vehicle issue - There is one page of notes about the applicant's use of a work vehicle to commute to and from home.[43] It appears that the notes were made by someone in a supervisory role who was investigating an unexpectedly high fuel bill. The notes indicate that the applicant also filed a grievance regarding the matter. All of the record has been disclosed to the applicant with the exception of the identity of a third party.

[67] RDN withheld the third party's identity under s. 22(3)(h) specifically. I cannot see how s. 22(3)(h) applies and RDN does not explain. However, I find that s. 22(3)(d) applies to the third party's identity in this context because it seems that the investigation was not just about concerns with the applicant's work conduct but also about the third party's work conduct and role in what was going on. Therefore, the withheld information relates to the third party's employment history, and its disclosure is presumed to be an unreasonable invasion of the third party's personal privacy under s. 22(3)(d).

[68] Other than the fact that the notes relate to an event that occurred 15 years ago, there are no circumstances that would weigh in favour of disclosure of the third party's identity. The applicant and RDN say nothing about this record.

[69] In conclusion, I am not satisfied that the s. 22(3)(d) presumption has been rebutted. Disclosing the third party's identity would be an unreasonable invasion of the third party's personal privacy under s. 22(1).

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[42] See, for example, Order F14-38, 2014 BCIPC 41 (CanLII), at para. 25.
[43] Page 51 of the records.

[70] Complainant A and B - RDN is also relying on s. 22(3)(h) to withhold the names and complaint details of two members of the public (Complainant A and B) who complained to RDN about the applicant. RDN and the applicant say nothing about this information.

[71] I have considered all of the s. 22(3) presumptions and find that none apply to the third parties' personal information. In particular, there is nothing to indicate that this information relates to a possible violation of the law (s. 22(3)(b)) or is a personal recommendation or evaluation, a character reference or a personnel evaluation supplied by a third party (s. 22(3)(h)).

[72] When complaints are made to a public body about the behaviour of one of its employees, it is usual for the complainant to provide their name, contact details and other identifying information in confidence. There is nothing suggesting otherwise in these complaints, so I find s. 22(2)(f) is a relevant factor weighing against disclosure of both complainants' personal information.

[73] It is obvious, however, based on what RDN has already disclosed and the context the records provide[44] that the applicant already knows the identity of Complainant A, as well as his home address and the complaint details. This factor weighs in favour a finding that disclosure of Complainant A's name, address and complaint details, in the context of this record, would not be an unreasonable invasion of third party personal privacy. However, there is no evidence that the applicant also knows Complainant A's phone number and email address and one other personal detail, and I can see no circumstances that weigh in favour of disclosing them to the applicant. Therefore, I find that disclosing that information to the applicant would be an unreasonable invasion of personal privacy under s. 22(1).[45] However, disclosure of the balance of the information, which is about the complaint itself, would not be.

[74] RDN has disclosed most of Complainant B's letter and is withholding only Complainant B's name and address and a few snippets about what Complainant B observed and did. The letter is about the applicant's driving. There is nothing to indicate that the applicant already knows the identity of Complainant B. After considering the relevant circumstances related to this information, I am satisfied that disclosing Complainant B's name and address would be an unreasonable invasion of personal privacy. However, if Complainant B's name and address are

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[44] Including the fact that they are involved in court litigation about this matter.
[45] On pp. 32-37 and 48-50 of the records.

severed, the balance of the information regarding the complaint is clearly no longer about an identifiable individual, so it may be disclosed.[46] This would allow the applicant to know the full details of the complaint against him.

[75] Water service complaint - RDN is withholding personal information in an email chain under s. 22(3)(f).[47] The emails are about a member of the public who complained to RDN about water quality and how RDN responded. None of the withheld information is about the applicant. Neither party says anything about this record.

[76] The withheld information is clearly not about the matters covered by s. 22(3)(f) (i.e., third party finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness). I also find that none of the other presumptions apply.

[77] I note that RDN has severed the personal information in this record in an inconsistent manner. It has disclosed the complainant's phone number and home address, as well as the portion of the email chain that reveals what the complaint is about and that the applicant was the first RDN employee to deal with it. RDN does not explain this inconsistency. Despite the fact that the applicant could easily identify this complainant, he does not know the balance of the information in dispute, some of which is about the complainant's emotional state and his neighbours' experiences. I have also considered the fact that disclosure of information through a FIPPA access request is, in essence, disclosure to the world because FIPPA places no restrictions on what an applicant may do with information he or she receives.[48] In light of those factors, I find that disclosure would be an unreasonable invasion of third party personal privacy.

[78] In conclusion, I find that although no presumptions apply to the information being withheld from this email chain, disclosing it would be an unreasonable invasion of third party personal privacy under s. 22(1).

[79] Identity of employees - Some background is necessary to understand the context of the information withheld from several emails.[49] The information relates to the applicant holding up signs at City of Nanaimo council meetings. A City of Nanaimo employee showed RDN a photo of the applicant doing this and asked if he was an RDN employee. An RDN employee confirmed he was. The applicant claimed he was being bullied and his union made inquiries on his behalf. There is no evidence of a grievance or a workplace investigation related to this matter.

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[46] On pp. 52-53 of the records.
[47] On p. 46 of the records.
[48] Order 03-35, 2003 CanLII 49214 (BCIPC), at para. 31.
[49] Pages 3, 5, 7, 8, 9, 12, 14, 15 of the records. The details I provide here have already been disclosed.

[80] RDN is withholding some, but not all, instances where the names of the City of Nanaimo employee and RDN employee are revealed.[50] RDN provides no explanation about why it is withholding these two identities and why only in some instances. As with all the third party personal information, RDN submits that s. 22(3)(d) applies but it provides no explanation.

[81] I find that s. 22(3)(d) does not apply for the following reasons. The names of the City of Nanaimo employee and RDN employee appear in objective, factual statements about what they said and did in their employment capacity (i.e., talking to each other in order to confirm where the applicant works). There is nothing in the context of the records where their names appear to suggest that anyone's work is being qualitatively assessed or evaluated, or that there is a workplace investigation or disciplinary matter underway. In my view, disclosing the identity of these two individuals in this context does not reveal information about their employment or occupational history as previous orders have interpreted those terms.[51] Therefore, s. 22(3)(d) does not apply to it.

[82] I have also considered the ss. 22(3)(f) and (h) presumptions, which RDN raises in a general sense as applying to all the disputed information. I find that they do not apply because the information is not about the matters they address. In summary, I find that no s. 22(3) presumptions apply to the identity of these two individuals.

[83] There is no doubt that the applicant will have already deduced the identity of the City of Nanaimo employee and the RDN employee who discussed whether he was an RDN employee. RDN has disclosed their names several times in the records where the context clearly reveals who they are. Therefore, it is not evident why disclosing the remaining instances where these two individual's names appear in the records would be an unreasonable invasion of their personal privacy.

[84] In addition, while RDN submits that s. 22(2)(h) is a relevant circumstance in this case, there is nothing suggesting that disclosure of the identity of these two individuals could unfairly damage anyone's reputation. RDN does not elaborate on its submissions in this regard.

[85] In conclusion, I find that no presumptions apply to the remaining instances where the names of the City of Nanaimo employee and the RDN employee have been withheld, and disclosing this information would not be an unreasonable invasion of third party personal privacy under s. 22(1).

[50] Their identity has been disclosed in several locations in pp. 3-9 of the records.
[51] See, for example, Order 01-53, 2001 CanLII 21607 (BC IPC) at para. 32; Order 00-53, 2000 CanLII 14418 (BC IPC) at p. 17.

[86] Email exchange between councillor and manager - RDN is also withholding some of what the City of Nanaimo's manager and a City of Nanaimo councillor said to each other about the fact that the City took steps to determine the applicant's identity and where he works. RDN is not withholding the identity of the manager and councillor, just some of what they said to each other.[52]

[87] I find that none of the s. 22(3) presumptions apply to the information at issue in this email exchange.

[88] Some of the withheld information is opinion about the applicant and how he was identified as an RDN employee, so it is the applicant's personal information. It is also the personal information of the already named individuals who provided the opinions, in this case the manager and councillor.

[89] In my view, all relevant circumstances weigh in favour of disclosing these opinions about the applicant and his situation to the applicant. First, RDN has already disclosed the identity of the manager and councillor and the majority of what they said about the applicant. Second, it is only in rare circumstances that disclosure of an applicant's personal information would be an unreasonable invasion of a third party's personal privacy.[53] Neither party provides submissions on this, nor can I see any circumstances that suggest that it would be. Third, there is nothing in the email exchange indicating that the opinions were supplied in confidence (s. 22(2)(f)). Evidently, the manager did not think the communication was confidential as he copied it to some RDN staff and the City and to the City's mayor and council. Therefore, I find that disclosing these opinions about the applicant and his situation to the applicant himself would not be an unreasonable invasion of third party personal privacy under s. 22(1).

[90] The councillor makes several comments in the email exchange that are not about the applicant, however, so they are not the applicant's personal information. They are the councillor's opinions about certain work practices, so they are the councillor's personal information. I have considered the fact that the councillor uses some inflammatory language. However, I do not give that circumstance much weight as I cannot see how disclosing this rhetoric would cause any harm to him or others (s. 22(2)(e) and (h)). Therefore, I conclude that disclosing the councillor's opinions about work-related practices would not be an unreasonable invasion of his or anyone else's personal privacy.

[91] In conclusion, none of the information in this email exchange must be withheld under s. 22(1).

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[52] This information is on p. 2 of the records.

[53] Order F06-11, 2006 CanLII 25571 (BC IPC) at paras. 77-79 and F10-10 2010 BCIPC 17 (CanLII) at para. 37.

Summary and conclusion, s. 22

[92] With the exception of a few instances of contact information, the information RDN is withholding under s. 22 is personal information. Most of it is third party personal information. However there is a small amount of information that is both third party personal information and the applicant's personal information because it is third parties' opinions about the applicant. I find that disclosing the applicant's personal information would not be an unreasonable invasion of third party personal privacy under s. 22(1).

[93] I find that s. 22(4)(e) applies to some of the third party personal information, so its disclosure would not be an unreasonable invasion of third party personal privacy.

[94] There is some third party personal information that relates to matters to which the ss. 22(3)(a), (b) and (d) presumptions apply. The presumptions have not been rebutted, so disclosure of that information would be an unreasonable invasion of third party personal privacy.

[95] No presumptions apply to the balance of the third party personal information. With only three exceptions, I find that this information may be disclosed without unreasonably invading third party personal privacy. The exceptions are some personal information related to the complaints made by Complainant A and B and the person who complained about water service. I find that disclosing that information would be an unreasonable invasion of third party personal privacy.

[96] All of the information that I find RDN must refuse to disclose under s. 22(1) has been highlighted in a copy of the records that will be sent to RDN along with this order.

CONCLUSION AND ORDER

[97] For the reasons provided above, I make the following order under s. 58(2) of FIPPA:

1. I confirm RDN's decision to refuse to give access to information under s. 13.

2. RDN is not authorized or required to refuse access to information under ss. 12(1), 17(1) or 21(1) of FIPPA, and it is required to give the applicant access to all of the information withheld under those exceptions.

3. The only information that RDN is required to refuse to give the applicant access to under s. 22(1) is the information highlighted in a copy of the records accompanying RDN's copy of this order.

4. RDN must comply with this Order on or before Tuesday, February 21, 2017 and concurrently provide the OIPC Registrar of Inquiries with a copy of its cover letter and the records sent to the applicant in compliance with this Order.

January 9, 2017

ORIGINAL SIGNED BY

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Elizabeth Barker, Senior Adjudicator

OIPC File No.: F15-60126