Order F17-03

CITY OF NANAIMO

Celia Francis
Adjudicator

January 16, 2017

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Summary: Three employees of the City of Nanaimo requested records related to the reclassification of several specified jobs. The City denied access to the records in their entirety, under s. 13(1) (advice or recommendations), s. 17(1) (financial harm to public body) and s. 22(1) (harm to third-party privacy). The adjudicator found that s. 17(1) did not apply to any of the information and that ss. 13(1) and 22(1) applied to only some of the information. The adjudicator ordered the City to disclose the records to which these exceptions did not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, 4(2), 13(1), 13(2), 17(1), 17(1)(c), 17(1)(d), 17(1)(e), 17(1)(f), 22(1), 22(2)(c), 22(2)(f), 22(3)(d), 22(4)(e).

Authorities Considered: B.C.: Order F08-22, 2008 CanLII 70316 (BC IPC); Order F12-02, 2012 BCIPC 2 (CanLII); Order 00-10, 2000 CanLII 11042 (BC IPC); Order F14-04, 2014 BCIPC 31 (CanLII); Order F10-24, 2010 BCIPC 35 (CanLII); Order F07-17, 2007 CanLII 35478 (BC IPC; Order 01-15, 2001 CanLII 21569 (BC IPC); Order F15-60, 2015 BCIPC 64 (CanLII); Order F16-32, 2016 BCIPC 35 (CanLII); Order F15-03, 2015 BCIPC 3 (CanLII); Order 01-53, 2015 BCIPC 3 (CanLII); Order F10-21, 2010 BCIPC 32 (CanLII); Order 01-07, 2001 CanLII 21561 (BC IPC); Order F15-54, 2015 BCIPC 57 (CanLII); Order F16-01, 2016 BCIPC 01 (CanLII); Order F15-72, 2015 BCIPC 78 (CanLII); Order F14-22, 2014 BCIPC 25 (CanLII); Order F13-08, 2013 BCIPC 9 (CanLII); Order 02-51, 2002 CanLII 42487 (BC IPC); Order 01-28, 2001 CanLII 21582 (BC IPC); Order F05-08, 2005 CanLII 11959 (BC IPC); Order F05-28, 2005 CanLII 30678 (BC IPC).

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3; *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner),* 2012 BCSC 875; *John Doe v. Ontario (Finance*), 2014 SCC 36; *3430901 Canada Inc. v. Canada (Minister of Industry)*, 1999 CanLII 9066 (FC); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner), 2002 BCCA 665.*

INTRODUCTION

[1] This order arises out of requests under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the City of Nanaimo ("City") from three City employees ("applicants") for records related to the evaluation of several specified jobs. The City responded by denying access to the records under s. 13(1) (advice or recommendations), s. 17(1) (harm to financial interests of a public body) and s. 22(1) (harm to third-party privacy) of FIPPA. Each of the applicants requested that the Office of the Information and Privacy Commissioner ("OIPC") review the City's decision to deny access to the records. Mediation did not resolve the requests for review and the matters proceeded to inquiry. The OIPC received submissions from the City and the applicants.

[2] There is some overlap among the records in dispute and the public body and the issues are the same in all three cases. The OIPC therefore conducted the three inquiries concurrently and I have dealt with all three in this order.

ISSUES

[3] The issues before me are whether the City is authorized by ss. 13(1) and 17(1) and required by s. 22(1) to refuse access to information. Under s. 57(1) of FIPPA, the City has the burden of proof respecting ss. 13(1) and 17(1). Under s. 57(2), the applicants have the burden of proof respecting third-party privacy.

DISCUSSION

Background

[4] In 2013, the City and one of its unions, CUPE Local 401 ("CUPE"), began a job evaluation review of the City's CUPE positions. The City and CUPE jointly developed the job evaluation process, which included an appeal mechanism ("reconsideration"). Representatives of the City and CUPE formed a Steering Committee to conduct the job evaluation process, which included gathering information from the City's CUPE employees, their supervisors, external consultants and the City's Human Resources ("HR") staff. Each employee was

notified of the resulting classification of her or his job[1] and had the opportunity to request a reconsideration of that classification. Ultimately, in April 2016, CUPE filed grievances on behalf of some employees who challenged the job evaluation process and reconsideration results. These grievances were still underway at the time of this inquiry.[2]

Records in dispute

[5] The records in issue in this case are as follows:

- Job Information Questionnaires ("JIQs"), which the City's CUPE employees filled out. The City withheld these records under ss. 17(1) and 22(1) of FIPPA.
- Job Evaluation Documents, which relate to the classifications of the jobs and which City HR Staff and the external consultants prepared.[3] The City withheld these records under ss. 13(1) and 17(1).

Harm to financial interests – s. 17(1)

[6] The City argued that ss. 17(1)(c), (d), (e) and (f) apply to all of the records. These provisions read as follows:

> **Disclosure harmful to the financial or economic interests of a public body**
>
> 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:
> …
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> (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
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> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

[1] The City added that each CUPE employee also received information related to the point values assigned to her or his job; the City's initial submission, para. 22.
[2] The City's initial submission, paras. 12-25; Affidavit of Paddy Bradley, Manager, Labour Relations, City of Nanaimo, paras. 1-19.
[3] The Job Evaluation Documents comprise three types of records: "job evaluation records," "job evaluation sheets," and "interfactor comparison sheets."

> (e) information about negotiations carried on by or for a public body or the government of British Columbia;
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> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[7] Previous orders have noted that ss. 17(1)(a) to (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).[4]

Standard of proof for s. 17(1)

[8] The Supreme Court of Canada set out the standard of proof for harms-based provisions in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground ... This inquiry of course 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" … [5]

[9] Moreover, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*,[6] Bracken J. 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 reasonably be expected to result in the identified harm.

[10] I have taken these approaches in considering the arguments on harm under s. 17(1).

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[4] See, for example, Order F08-22, 2008 CanLII 70316 (BC IPC), at para. 43.
[5] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3, at para. 94.
[6] 2012 BCSC 875, at para. 43.

Would disclosure result in harm under s. 17(1)?

[11] The City's s. 17(1) financial harm arguments blended the various elements in ss. 17(1)(c), (d), (e) and (f).[7] I have summarized them below, as I understand them.

[12] **Plans & proposals - ss. 17(1)(c) & (d) —** The City argued that disclosure of the records would reveal "information that relates to personnel matters which have yet to be implemented" and would lead to "the premature disclosure of a proposal concerning management of personnel". This argument appears to be directed at both s. 17(1)(c)[8] and s. 17(1)(d).[9] I also understand the City to be referring here to what it called its "job evaluation process" or "plan" which, it said, has not yet been implemented.

[13] Past orders have interpreted a "plan" as being "something that sets out detailed methods and action required to implement a policy."[10] The dictionary definition of "proposal" includes a "suggestion" or "plan,"[11] for example, to reduce costs[12] or on the implementation of insurance pricing.[13] The records in dispute do not, in my view, reveal information on any "plans" or "proposals" for the purposes of s. 17(1)(c) or 17(1)(d). At most, they contain raw material on which such plans or proposals may be based.

[14] **Undue financial loss - s. 17(1)(d) —** The City said that the goal of the job evaluation process was to ensure equity in compensation for its CUPE employees. The City argued that continued confidentiality of the records in dispute is important to the integrity and fairness of the classification and job evaluation process which, it said, will not be completed until the associated grievances are determined. The City argued that disclosure of the records would undermine the fairness of the job evaluation process, as employees "would have a very strong incentive to manipulate the reconsideration process or future job evaluation processes … to get a higher job classification." The City said that this "would harm the integrity of the entire job evaluation process and scoring guide, and would likely result in those employees receiving wage increases, which will increase costs to the City." This argument appears to refer to undue financial loss for the purposes of s. 17(1)(d).

[15] The applicants said that City employees often perform job functions interchangeably, "to get the job done." They said that, therefore, the contents of

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[7] City's initial submission, paras. 64-74.
[8] This provision refers to "plans that relate to the management of personnel … that have not yet been implemented".
[9] This provision refers to "the premature disclosure of a proposal".
[10] See, for example, Order F12-02, 2012 BCIPC 2 (CanLII), at para. 40.
[11] Online definitions.
[12] See, for example, Order 02-51, 2002 CanLII 42487 (BC IPC).
[13] See Order 01-28, 2001 CanLII 21582 (BC IPC), for example.

another employee's JIQ have a bearing on the reclassification of their own jobs. The applicants argued that it is important to compare the contents of the JIQs and Job Evaluation Documents to ensure that the resulting classifications accurately reflect the duties and requirements of the jobs.[14]

[16] Previous orders have said that the ordinary meaning of "undue" financial loss or gain includes excessive, disproportionate, unwarranted, inappropriate, unfair or improper financial loss or gain, having regard for the circumstances of each case.

[17] However, the City said only that the wage increases would be "likely" and did not explain how this might occur. Moreover, the City's evidence is that its job evaluation and reconsideration processes, not to mention the grievance process, have many stages and include a number of checks and balances. I do not accept that these processes are so fragile as to be unable to withstand potentially unmerited classification challenges from its employees, now or in the future. Nor am I persuaded that disclosure of the information in dispute would "likely" lead to an increase in the City's costs. Further, even if there were any such increase in its costs, the City did not specify how much this increase would be or explain how it would be "undue," for the purposes of s. 17(1)(d). I also note that the applicants said that, after a lengthy reconsideration process, which included a comparison of relevant JIQs, two jobs received a slightly higher rating. There is no evidence that the City's costs increased as result of that reconsideration.

[18] **Negotiating position - ss. 17(1)(e) & (f) —** The City said that the applicants want information about jobs other than their own, for their own interests in collective bargaining. The City argued that disclosure could thus harm its negotiating position in future negotiations and collective bargaining with CUPE over job classifications. These arguments appear to be directed mainly at s. 17(1)(f), although the City also referred to s. 17(1)(e).

[19] Beginning with s. 17(1)(e), the City did not explain how the withheld information is "about negotiations." Past orders have said that this provision applies to information about negotiating techniques, strategies, criteria, positions or objectives.[15] I do not consider that the information in dispute is "about" negotiations the City is carrying on, or will carry on, for the purposes of s. 17(1)(e). Rather, it consists of City employees' statements about their job duties and assessments of the ten factors under consideration related to each job.

[20] Turning to s. 17(1)(f), the City did not say if the applicants' job classifications, or those that were the subject of the request, were anticipated or

[14] Employees' submission.
[15] See, for example, Order F10-24, 2010 BCIPC 35 (CanLII), at para. 60.

scheduled to be the subject of any future negotiations with CUPE. The City also did not explain how disclosure of the information in dispute would put it at a disadvantage in attempting to address job evaluations generally in the next round of collective bargaining, thus harming its negotiating position with CUPE for the purposes of s. 17(1)(f).

[21] **City's other arguments —** The City argued that, if CUPE employees knew how their jobs were evaluated, it would lead to "morale issues and a divisive workplace where those that are rated lower look at their co-workers with resentment."[16] I do not accept this argument. The existence of the grievances shows that City employees do not need details of the job evaluation process in order to demonstrate their dissatisfaction with its results. It is equally possible, if not more so, that transparency in the job evaluation process could lead to a more harmonious workplace, as employees would have a better understanding of how their jobs were classified. Even if disclosure of the records did lead to morale issues, however, the City did not explain how this could result in harm under s. 17(1).

[22] The City also argued that Order No. 186B-1997[17] is relevant here. In that case, however, former Commissioner Flaherty found that the records revealed information of the types that s. 17(1) is designed to protect. In my view, the information in issue here is not of the same character.

Conclusion on s. 17(1)

[23] For reasons given above, the City has not, in my view, provided objective evidence that is well beyond or considerably above a mere possibility of harm. Such evidence is necessary to establish a reasonable expectation of harm under s. 17(1). It has not demonstrated a clear and direct connection between disclosing the information in dispute and the alleged harms. Rather, it provided vague assertions, unsupported by evidence, which do not persuade me that disclosure of the information in dispute could reasonably be expected to result in harm under s. 17(1)(c), (d), (e) or (f) or, more generally, under s. 17(1). The City has not met its burden of proof respecting s. 17(1). Therefore, I find that s. 17(1) does not authorize the City to withhold the information in dispute.

Advice or recommendations – s. 13(1)

[24] The City argued that s. 13(1) applies to the Job Evaluation Documents in their entirety. The applicants did not explicitly address this exception. Section 13(1) is a discretionary exception which says that 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." Section 13(2)

[16] The City's initial submission, paras. 64-74; Bradley Affidavit, paras. 20-27.
[17] 1997 CanLII 669 (BC IPC).

of FIPPA states that a public body may not refuse to withhold certain types of information under s. 13(1). Numerous orders have considered the application of s. 13 of FIPPA, for example, Order F07-17,[18] which stated that:

> In making a determination regarding s. 13, a public body must first determine whether the material fits within the scope [of] s. 13(1). If it does, the public body must then go on to determine whether the material falls within any of the categories set out in s. 13(2). If the records at issue are caught by one of the categories under s. 13(2), the public body must not refuse disclosure under s. 13(1). If the public body determines that the material falls within s. 13(1) and is not caught by any of the s. 13(2) categories, the public body must then decide whether to exercise its discretion to refuse disclosure.

Standard for interpreting s. 13(1)

[25] Many orders and court decisions have considered the purpose and interpretation of s. 13(1). The Supreme Court of Canada has stated that the term "advice" includes an expression of opinion on policy-related matters and that policy options prepared in the course of the decision-making process fall within the meaning of "advice or recommendations."[19] The leading case in B.C. on s. 13(1) is *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*,[20] which found that "advice" includes expert opinion on matters of fact on which a public body must make a decision for future action. The B.C. Court of Appeal also recognized that some degree of deliberative secrecy fosters the decision-making process.

[26] In Order 01-15,[21] former Commissioner Loukidelis expressed the view that the purpose of s. 13(1) is to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations. Previous OIPC orders have added that a public body is authorized to refuse access to information that would enable an individual to draw accurate inferences about advice or recommendations.[22]

[27] In arriving at my decision on s. 13(1), I have considered the principles for applying s. 13(1) as set out in the court decisions and orders cited above.

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[18] Order F07-17, 2007 CanLII 35478 (BC IPC), at para 18.
[19] *John Doe v. Ontario (Finance*), 2014 SCC 36, at paras. 34, 46, 47. The Supreme Court of Canada also approved the lower court's views in *3430901 Canada Inc. v. Canada (Minister of Industry)*, 1999 CanLII 9066 (FC), that there is a distinction between advice and factual "objective information", at paras. 50-52.
[20] 2002 BCCA 665.
[21] 2001 CanLII 21569 (BC IPC), at para. 22.
[22] See, for example, Order F15-60, 2015 BCIPC 64 (CanLII), at para. 12. See also Order F16-32, 2016 BCIPC 35 (CanLII).

The City's submission

[28] The City said that the City HR staff and the external consultants recommended point values for the jobs, based on their expert assessments of the JIQs. It said the Steering Committee then used the recommended assessments, as well as software calculations based on those assessments, to assign total point values and classifications to the CUPE jobs under review and to make other decisions during the job evaluation process. The City noted that the job evaluation process is still incomplete, because the associated grievances are still underway.

Analysis and finding

[29] The Job Evaluation Documents contain information on the titles of the jobs and their work areas. They also list the ten factors under consideration for each job. The names and titles are factual information related to the jobs themselves. The ten factors are the same for each job under review. This type of information would not reveal any advice or recommendations developed for a public body. I find that s. 13(1) does not apply to this information.

[30] Some of the Job Evaluation Documents[23] contain the handwritten point values that the consultants and Human Resources staff assigned to each of the ten factors for the jobs under review. These records also contain the consultants' "evaluation comments."

[31] Other Job Evaluation Documents[24] show the various values for the ten factors that the software calculated. In some cases these calculated values are different from the handwritten values.

[32] I accept that the Steering Committee considered the recommended point values and the evaluation comments in deciding on the final values and classifications to assign to each job. I find that disclosure of this information would reveal advice or recommendations developed for a public body or information from which one could draw accurate inferences about advice or recommendations.

[33] The City argued, and I agree, that s. 13(2) does not apply here. There is, for example, no factual material, appraisal, economic forecast or other information listed in s. 13(2).

[34] Given that the evaluation process is still underway, I am also satisfied that the City exercised its discretion properly in deciding to withhold the information about the recommended point values assigned to each job.

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[23] The "job evaluation records."
[24] The "job evaluation sheets" and "interfactor comparison sheets."

[35] The City did not address s. 4(2) of FIPPA. This section says that, if information to which an exception applies can reasonably be severed, an applicant has a right of access to the remaining information. The information to which I found s. 13(1) applies, can in my view, reasonably be severed from the Job Evaluation Documents and the rest disclosed.

Third-party privacy – s. 22(1)

[36] The City argued that s. 22(1) applies to the JIQs in their entirety, while the applicants argued that it does not.

Approach to applying s. 22(1)

[37] The approach to applying s. 22(1) of FIPPA has long been established. See, for example, Order F15-03:

> Numerous orders have considered the approach to s. 22 of FIPPA, which states that a "public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy." This section only applies to "personal information" as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. 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, the public body 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.[25]

[38] I have taken the same approach in considering the s. 22 issues here.

Is the information "personal information"?

[39] FIPPA defines "personal information" as recorded information about an identifiable individual, other than contact information.[26] The City argued that the information in the JIQs is about identifiable individuals and is therefore their personal information. The applicants suggested that any handwritten JIQs could be typed to remove personal identifiers.

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[25] 2015 BCIPC 3 (CanLII), at para. 58.

[26] 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." See Schedule 1 of FIPPA for these definitions.

[40] Each JIQ begins with introductory comments and instructions. It asks the CUPE employee to fill in the relevant job title, the name of the incumbent,[27] the name and title of the incumbent's supervisor and the main areas of responsibility of the job. The remaining pages ask the incumbent to answer questions about the ten factors the job evaluation review was to assess for each job, for example, "knowledge gained through education," "working conditions and environment," "dexterity" and "accountability." Each JIQ includes spaces for the supervisor to comment on the completeness and accuracy of the incumbent's answers.

[41] The introductory portions and the questions on the ten factors are the same for each JIQ. They are not "about" identifiable individuals and are therefore not "personal information."

[42] One JIQ does not list an incumbent for the particular job, although it does state the name and title of the supervisor of that position. The information about the supervisor is "about" an identifiable individual and is therefore "personal information." However, the remaining information in this JIQ, including the information the supervisor provided about the job duties, is not "about" an identifiable individual and is not "personal information."

[43] The remaining JIQs all contain the names and titles of the incumbents and their supervisors, the responsibilities of each job, each incumbent's answers to the questions on the ten factors and the supervisors' comments. These types of information are all about identifiable individuals and I find that they are "personal information."

Does s. 22(4) apply?

[44] Section 22(4) of FIPPA sets out a number of situations in which disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. The City argued that s. 22(4), specifically, s. 22(4)(e), does not apply to the information in the JIQs. This provision reads as follows:

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

[45] Past orders have said that s. 22(4)(e) covers information such as the name, title and remuneration (including severance payments) of a public body

[27] One JIQ does not list an incumbent and appears to have been completed by a supervisor.

employee, as well as information on the duties or responsibilities of a public body employee. Past orders have also said that the context in which the information in dispute appears determines whether it falls under s. 22(4)(e) or s. 22(3)(d).[28]

[46] The City argued that the information in the JIQs is not objective, factual statements of the incumbents' job duties and functions but consists of their personal opinions and evaluative comments about their jobs.[29] The applicants countered that the original intent of the JIQs was for the incumbents "to accurately reflect, based on the duties and education requirements, what was being performed according to the job description."

[47] The introductory instructions in the JIQs tell incumbents to "describe your job, much like you would in a traditional job description ... just indicate what you do in your job." The instructions on the ten factors tell incumbents to describe the "knowledge and skills required to do the work", the "formal education and/or training required to do the described work," the knowledge and skills that "a person must have and apply to do the job" and the "minimum type of formal education typically required to do the job, based on the requirements of the work itself, not what you have."

[48] The information on the incumbents' and their supervisors' names and titles is factual information about their positions as public body employees, of the type that past orders have found to fall under s. 22(4)(e). Further, the incumbents' descriptions of their jobs and their answers to the questions on the ten factors are, in my view, factual, objective information about their job functions and duties and of the educational and other requirements of their jobs. In that way, the information is much like that found in a job description. The information was not provided in the context of a workplace investigation but rather as part of an objective job review. The information is not about identifiable individuals but about job positions and functions. While the information describes the jobs, it does not evaluate individuals. Nor do the incumbents express any personal opinions about their jobs or their workplace situations. The information is, in my view, precisely the kind of information that past orders have found falls under s. 22(4)(e). With minor exceptions which I address below, I find that the information that the incumbents provided in the JIQs falls under s. 22(4)(e). This means its disclosure is not an unreasonable invasion of third-party privacy and s. 22(1) does not apply to it.

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[28] See, for example, Order 01-53, 2015 BCIPC 3 (CanLII), at para. 40 and Order F10-21, 2010 BCIPC 32 (CanLII), at paras. 22-24.

[29] The City's initial submission, para. 40.

*Presumed unreasonable invasion of third-party privac*y – s. 22(3)

[49] The next step is to consider whether disclosure of the information in issue is presumed to be an unreasonable invasion of a third party's personal privacy. The City argued that the information in the JIQs relates to the incumbents' employment history and that s. 22(3)(d) therefore applies to it. The applicants said that the JIQs did not require the incumbents' employment history, but rather asked for the experience required for the position.

[50] Section 22(3)(d) reads as follows:

> 22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (d) the personal information relates to employment, occupational or educational history,
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> …

[51] I found above that, with minor exceptions, s. 22(4)(e) applies to the personal information contained in the JIQs. I need to consider, therefore, if s. 22(3) applies to the small amount of information that I found does not fall under s. 22(4)(e).

[52] I find only one instance where s. 22(3)(d) applies to the personal information. It is in one JIQ, where an incumbent provides some information about an assignment she performed in the past. The JIQ also contains her supervisor's comments about what the incumbent said. This information relates to the incumbent's own particular career progression, rather than to the requirements of her position. In my view, this information relates to the incumbent's employment history and I find that s. 22(3)(d) applies to it. This means disclosure is presumed to be an unreasonable invasion of her personal privacy.

[53] In another JIQ, an incumbent provides information about how a particular aspect of her job affects her emotionally. While it does not fall under s. 22(3)(d), it is personal information of a sensitive nature.[30]

Relevant circumstances – s. 22(2)

[54] In determining whether disclosure of personal information is an unreasonable invasion of third-party personal privacy under s. 22(1) or 22(3),

[30] Past orders have said that, even if personal information does not fall under s. 22(3), this does not mean that, under s. 22(1), the information can be disclosed without unreasonably invading third-party privacy. See, for example, Order F05-08, 2005 CanLII 11959 (BC IPC), and F05-28, 2005 CanLII 30678 (BC IPC).

a public body must consider all the relevant circumstances, including those set out in s. 22(2). At this point, the presumption that disclosure of the withheld information would be an unreasonable invasion of personal privacy may be rebutted. The parties raised the following relevant circumstances:

> 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
> …
> (c) the personal information is relevant to a fair determination of the applicant's rights,
> …
> (f) the personal information has been supplied in confidence,
> …

[55] **Applicants' rights** — The City argued that the JIQs are not relevant to the applicants' rights in relation to the reconsideration of their own job classifications.[31] The applicants argued that a comparison of other employees' JIQs is relevant to their own job classifications.

[56] Previous orders have held that s. 22(2)(c) only applies if all of the following circumstances are met:

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.

4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.[32]

[57] I noted above that the reconsideration procedure allowed CUPE employees to refer to other jobs they considered to be comparable to theirs and to explain why they think this.[33] I therefore understand the applicants' point to be that JIQs for jobs other than their own are relevant in a reconsideration of the classification of their own jobs or possibly even in a related grievance.

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[31] The City's initial submission, para. 48.
[32] See, for example, Order 01-07, 2001 CanLII 21561 (BC IPC) and Order F15-54, 2015 BCIPC 57 (CanLII).
[33] Exhibit B, Bradley affidavit.

[58] However, the City indicated that the reconsideration process is over. Moreover, the employees did not explicitly state that the classification of their own jobs is the subject of the outstanding grievances. I also do not see how the small amount of information that falls under s. 22(3)(d) or the other information would have any bearing on, or be necessary for, a grievance. I do not therefore consider that the information in the JIQs meets the criteria for s. 22(2)(c). This factor therefore does not favour disclosing the information in issue.

[59] **Supplied in confidence —** The City said that the job evaluation process, the JIQs and details of how the classifications were determined were kept confidential. The City also said that the JIQs were provided in confidence only to those involved in the job evaluation process (*i.e.*, the consultants, Human Resources staff, supervisors and the Steering Committee, as well as to any directors involved in the reconsideration process).[34] However, the City also said that it did not tell its CUPE employees to keep their JIQs confidential from others. Rather, they were told that they could work with their supervisors, union representatives or other employees with the same jobs when filling out their JIQs. The City said that, later on, when some CUPE employees complained that they were being pressured by their colleagues to share their JIQs when they wished to keep them confidential, the City issued directions that employees were not to be pressured.[35]

[60] The applicants acknowledged that preparation of the JIQs became "personal" for some employees but did say that some employees shared their JIQs as part of the reconsideration process. The applicants did not state what, if anything, they were told by the City about the confidentiality of their JIQs.

[61] Past orders have discussed factors to consider in deciding whether personal information was "supplied in confidence" under s. 22(2)(f). These include the following: the type and sensitivity of the information (*e.g.*, résumés); the context (*e.g.*, bylaw complaints, workplace complaints and investigations, interviews with victims of crime); an expectation of confidentiality on the part of those supplying the information; whether those receiving the information acknowledged its confidentiality and treated it as such; and markings of confidentiality on the records.[36]

[62] While City employees were not required to keep their JIQs confidential from each other, I accept the City's evidence that the JIQs were supplied in confidence only to those involved in the job evaluation process and that these individuals treated and continue to treat the JIQs in confidence. I therefore find that s. 22(2)(f) applies and weighs in favour of withholding this information.

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[34] Bradley affidavit, paras. 22-23.
[35] Bradley affidavit, paras. 23-24.
[36] See, for example, Order F16-01, 2016 BCIPC 01 (CanLII), Order F15-72, 2015 BCIPC 78 (CanLII), Order F14-22, 2014 BCIPC 25 (CanLII) and Order F13-08, 2013 BCIPC 9 (CanLII).

[63] In addition, the sensitivity of the information about the employee's emotional reaction to her job suggests that she supplied it in confidence. I therefore find that s. 22(2)(f) also weighs in favour of withholding this information.

Conclusion on s. 22(1)

[64] I found above that some of the information in the JIQs is not personal information. The balance of the information in the JIQs is personal information, and most of it falls under s. 22(4)(e), so disclosing it would not be an unreasonable invasion of personal privacy. I found, however, that a small amount of personal information falls under s. 22(3)(d) and that the presumption regarding it has not been rebutted. I also found the relevant circumstance favours withholding another small amount of information. The applicants have not met their burden of proof regarding this third-party personal information. I therefore find that s. 22(1) requires the City to withhold these two small amounts of information.

CONCLUSION

[65] For reasons given above, I make the following orders:

1. Under s. 58(2)(a) of FIPPA,

    a. I have determined that the City is not authorized by s. 17(1) to deny the applicants access to the information it withheld under that section. Subject to items 2 and 3 below, I require that the City disclose this information to the applicants.

    b. I have determined that the City is not authorized by s. 13(1) to deny the applicants access to some of the information it withheld under that section and, subject to item 2 below, I require that the City disclose this information to the applicants.

    c. I have determined that the City is not required by s. 22(1) to deny the applicants access to most of the information it withheld under that section and, subject to items 2 and 3 below, I require that the City disclose this information to the applicants.

2. Under s. 58(2)(b) of FIPPA, I confirm that the City is authorized by s. 13(1) to deny the applicants access to some of the information it withheld under that section, as follows:

    - Job Evaluation Sheets: the information in the columns entitled "degree level points" and in the boxes entitled "total points"

- Interfactor Comparison Sheets: the information in the boxes entitled "band," "degrees," "level," and "points"

- Job Evaluation Records: the information in the columns entitled "Evaluation Comments" and "Degree Level" and in the boxes entitled "total points"

3. Under s. 58(2)(c), I confirm that the City is required by s. 22(1) to deny the applicants access to the information highlighted in pink in the two JIQs that I provide to the City with its copy of this order.

4. As a condition under s. 58(4), I require the City to give the applicants access to the information I found must be disclosed by Tuesday, February 28, 2017. The City must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicants, together with an electronic copy of the records.

January 16, 2017

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File Nos.: F15-60837
F15-60839
F15-60840
F15-60890