Office of the Information & Privacy Commissioner for British Columbia

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Order F17-31

MINISTRY OF JUSTICE

Carol Whittome
Adjudicator

June 6, 2017

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Summary: An applicant requested information about Immediate Roadside Prohibitions that the Tofino RCMP issued during a particular period of time. The Ministry provided the responsive records and withheld some information under s. 14 (solicitor client privilege), s. 16(1)(b) (information received in confidence from a federal government agency) and s. 22 (unreasonable invasion of personal privacy) of FIPPA. The adjudicator found that the Ministry was authorized under s. 14 and required under s. 22 to withhold the information. The adjudicator, therefore, did not have to consider whether s. 16(1)(b) applied to the records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14, 16(1)(b) and 22.

Authorities Considered: B.C.: Order F15-52, 2015 BCIPC 55 (CanLII); Order F15-67, 2015 BCIPC 73 (CanLII); Order 04-25, 2004 CanLII 45535 (BC IPC); Order F13-29, 2013 BCIPC 38 (CanLII); Order F16-26, 2016 BCIPC 28 (CanLII); Order 01-53, 2001 CanLII 21607; Order F11-04, 2011 BCIPC 4 (CanLII); Order F05-18, 2005 CanLII 24734; Order F12-12, 2012 BCIPC 17 (CanLII); Order 01-52, [2001] B.C.I.P.C.D. No. 55; Order F17-25, 2017 BCIPC 26 (CanLII); Order 01-26, 2001 CanLII 21580 (BC IPC); Order 14-39, 2014 BCIPC 42 (CanLII).

Cases Considered: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; *R. v. B.*, 1995 CanLII 2007 (BC SC); *Golden Valley Golf Course Ltd. v. British Columbia (Minister of Transportation and Highways)*, 2001 BCCA 392 (CanLII); *Prassad v. Canada (Minister of Employment & Immigration)*, 1989 CanLII 131; *British Columbia (Minister of Water, Land and Air Protection) v. British Columbia (Information and Privacy Commissioner)*, 2004 BCCA 210 (CanLII).

INTRODUCTION

[1] The applicant requested that the Ministry of Justice (Ministry) disclose records about Immediate Roadside Prohibitions (IRPs) the Tofino RCMP issued from September 2014 to approximately August 2015. The Ministry released some records but withheld other records and information pursuant to s. 13 (advice or recommendations), s. 14 (solicitor client privilege), s. 16(1)(b) (information received in confidence from a federal government agency), s. 17 (harm to financial or economic interests) and s. 22 (unreasonable invasion of personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision to withhold information. During mediation, the Ministry reconsidered its original severing decision and released additional information to the applicant, but it continued to withhold some information. Mediation failed to resolve all the issues in dispute and they proceeded to inquiry.

[3] During the inquiry process, the Ministry again reconsidered its severing decisions, withdrew its reliance on ss. 13 and 17 and released additional information to the applicant. However, it continued to withhold information under ss. 14, 16(1)(b) and 22.

ISSUES

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

1. Whether the Ministry is authorized to refuse to disclose the information at issue under ss. 14 and 16(1)(b); and

2. Whether the Ministry is required to refuse to disclose the information at issue under s. 22 of FIPPA.

[5] Section 57 of FIPPA governs the burden of proof in an inquiry. The Ministry has the burden of proving that the applicant has no right of access to the information it is refusing to disclose under ss. 14 and 16(1)(b). 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

Background

[6] RoadSafetyBC is the provincial government agency responsible for developing and implementing effective road safety policies, such as the IRP

program.[1] Under this program, drivers who provide a breath sample that results in a reading of blood alcohol content of 0.05% or higher are issued an IRP and given a three, seven, 30 or 90-day driving prohibition, depending on their blood alcohol content reading and/or number of previous IRPs.[2]

[7] Sometime between September 2014 and August 2015, the Tofino RCMP issued IRPs to various individuals. It is clear from the information the Ministry has already disclosed to the applicant that there was a technical problem with some of the equipment used to test breath samples. This resulted in the Tofino RCMP cancelling 39 IRPs.[3]

Records

[8] The records consist of emails, template letters, advice to the minister and spreadsheets.

Preliminary Issue - Providing Notice to Third Parties after Close of Inquiry

[9] The Ministry concluded its submissions in this matter with the following: "[I]t would be appropriate for the Commissioner, in the event that he determines that s. 22 does not apply to any parts of the Section 22 Information, to afford the third parties the opportunity to make submissions in this matter."[4]

[10] Section 54(b) of FIPPA states that upon receiving a request for review the Commissioner must give a copy to the head of the public body concerned and to "any other person that the commissioner considers appropriate." It is trite law that an administrative tribunal has the authority to control its own procedures,[5] and the Court of Appeal has stated that s. 54(b) affords a "fair measure of discretion to the Commissioner."[6] The provision states that notice is to occur at the "request for review" stage (*i.e.*, the investigation stage), but the Commissioner retains the discretion to provide notice during an inquiry.[7]

[11] FIPPA also contains statutory provisions outlining a public body's obligation to give notice to third parties in particular situations. If the public body intends to disclose a third party's personal information, s. 23 states that it must

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[1] Deputy Superintendent of Motor Vehicles affidavit, para. 3.
[2] Deputy Superintendent of Motor Vehicles affidavit, para. 5.
[3] Ministry submissions, para. 17.
[4] Ministry submissions, para. 54.
[5] See *Golden Valley Golf Course Ltd. v. British Columbia (Minister of Transportation and Highways)*, 2001 BCCA 392 (CanLII), para. 31, citing *Prassad v. Canada (Minister of Employment & Immigration)*, 1989 CanLII 131.
[6] Para. 29.
[7] Order 01-52, [2001] B.C.I.P.C.D. No. 55 (letter decision), p. 11, online: https://www.oipc.bc.ca/decisions/140; aff'd in *British Columbia (Minister of Water, Land and Air Protection) v. British Columbia (Information and Privacy Commissioner)*, 2004 BCCA 210 (CanLII).

provide notice to that third party. If the public body intends to withhold the information then it may (but is not required to) give notice to the third party. Where notice is given under s. 23, the third party has the right to consent to the disclosure or make submissions as to why he or she believes the information should be withheld under s. 22(1). The notice provisions ensure procedural fairness for third parties affected by a public body's decision. The notice provisions also help to inform a public body's decision making process by ensuring it has all of the relevant information when it makes its disclosure decisions.[8]

[12] The public body is generally in the best position to provide notice to third parties who may be affected by disclosure decisions and can do so at a much earlier stage than the OIPC.[9] I agree with previous orders that have found that this should occur before an inquiry begins, not afterwards or based on the outcome of the inquiry.[10] This is not to say the Commissioner would never invite third parties as an appropriate person after the close of an inquiry, but this would only occur if the prejudice to the third party would be greater than the prejudice to the applicant. As noted in a previous order, this would only occur in an unusual case.[11]

[13] I note in this case that the Ministry chose not to provide s. 23 notice to individuals who may have a privacy interest in the withheld information. The Ministry also chose not raise this issue with the OIPC after it received the Notice of Inquiry and prior to the submissions deadline. Instead, it waited until its initial submissions to state its position on s. 54(b) notice, providing no arguments, evidence or details as to why it did not raise this earlier or why the OIPC should exercise its discretion to provide such notice after the inquiry has closed. Furthermore, the Ministry could have obtained affidavit evidence from the affected third parties but chose not to.

[14] In my view it would be highly prejudicial to an applicant to not only be forced to endure a lengthy delay, but to also have to respond to new evidence and submissions that a public body could have provided much earlier in the process. This effectively gives the public body a second opportunity, after the inquiry process has closed, to add further evidence to shore up its position that s. 22 applies to the withheld information. This tactic is contrary to the fair, efficient

[8] Order F17-25, 2017 BCIPC 26 (CanLII), para. 13.
[9] For example, the public body has the full names and contact information of the third parties and can readily contact them to determine whether they would consent or object to the disclosure before the matter enters the OIPC's investigation and mediation or inquiry processes. Furthermore, it is common to have multiple third parties mentioned in records, and if the OIPC had to provide notice and accept submissions from all of these parties after the inquiry has closed, it would have severe consequences to the OIPC's ability to provide fair, efficient and timely resolution of disputes.
[10] Order 01-26, 2001 CanLII 21580 (BC IPC), para. 47 and 48; Order F14-39, 2014 BCIPC 42 (CanLII), para. 63.
[11] Order F14-39, 2014 BCIPC 42 (CanLII), paras. 61 – 65.

and timely resolution of disputes under FIPPA and should not be routinely employed by public bodies.

[15] In this case I do not find it necessary to decide whether the third parties should be given notice at this late stage because, as will be explained below, I find that the Ministry is required to withhold the personal information under s. 22.

Section 14 – legal advice

[16] Section 14 of FIPPA states that a public body may refuse to disclose information that is subject to solicitor client privilege. Section 14 includes both types of solicitor client privilege found at common law: legal advice privilege and litigation privilege.[12] The Ministry is claiming legal advice privilege over the information it has withheld under s. 14. The test for determining whether legal advice privilege applies has been articulated as follows:

> [T]he privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:
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> 1. there must be a communication, whether oral or written;
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> 2. the communication must be of a confidential character;
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> 3. the communication must be between a client (or his agent) and a legal advisor; and
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> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.
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> If these four conditions are satisfied then the communications (and papers relating to it) are privileged.[13]

[17] The above criteria have been consistently applied in OIPC orders, and I will consider the same criteria here.[14]

[18] The Ministry did not provide me with copies of the records to which it applied s. 14. However, the Ministry submits that the content of an affidavit sworn by the Deputy Superintendent of Motor Vehicles establishes that the four criteria are met in this case and, therefore, it is authorized to withhold the information.

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[12] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, para. 26

[13] *R. v. B.*, 1995 CanLII 2007 (BC SC), para. 22

[14] See, for example, Order F15-52, 2015 BCIPC 55 (CanLII), para. 10; Order F15-67, 2015 BCIPC 73 (CanLII), para. 12.

[19] In that affidavit, the Deputy Superintendent deposes that some of the information withheld under s. 14 consists of confidential communications to and from Ministry staff and its legal counsel that were directly related to seeking, formulating or providing legal advice with respect to the IRPs.[15] There is also an email that he sent to other Ministry staff which he says contains a summary of confidential legal advice that the Ministry received from legal counsel.[16] The Deputy Superintendent further states that, to his knowledge, the information withheld under s. 14 was not shared with anyone outside of the Ministry and was only shared within the Ministry to employees "whose jobs necessitated knowing this information."[17]

[20] The applicant submits that not all communication between lawyers and their clients are covered by privilege, and the Ministry has not explained how this communication is legal advice and not policy advice.[18] Further, the applicant states that the Ministry has not provided any evidence related to the subject matter of the advice or the circumstances in which it was sought and provided.[19]

[21] In its final reply, the Ministry states that the withheld information is not policy advice but rather is legal advice received from government lawyers.[20]

Analysis and Conclusion – Section 14

[22] The Ministry did not provide me with copies of the records to which it applied s. 14. Instead, the Ministry relies on the contents of an affidavit sworn by the Deputy Superintendent. Where the public body does not provide the OIPC with records to which it has applied s. 14, it is preferable to have legal counsel who provided the advice swear evidence in support of a public body's claims to privilege. However, in this case, the Deputy Superintendent's sworn affidavit evidence describes the contents of the documents in sufficient detail such that I can make a determination as to whether s. 14 applies to the withheld information.

[23] The Deputy Superintendent describes the documents that were exchanged between legal counsel and the Ministry as being a legal opinion and emails containing legal advice about the invalid IRPs. I accept this affidavit evidence and find that the documents exchanged between the Ministry and its legal counsel were confidential communications directly related to seeking or providing legal advice related to the IRP issue.

[15] Deputy Superintendent affidavit, para. 9.
[16] Deputy Superintendent affidavit, para. 9.
[17] Deputy Superintendent affidavit, para. 10.
[18] Applicant submissions, paras. 15 – 17.
[19] Applicant submissions, para. 18.
[20] Ministry final reply submissions, para. 2.

[24] There is also the email where only a small portion of the information is withheld under s. 14. The Deputy Superintendent deposes that this is part of an email that he sent to other Ministry staff and the withheld portion is a summary of legal advice the Ministry obtained directly from legal counsel. I accept the Ministry's affidavit evidence and find that disclosing this information would reveal the substance of the legal advice rendered, which would reveal confidential communications between a client and lawyer for the purpose of seeking, formulating, or giving legal advice. This finding is consistent with previous orders that have found that internal discussions about legal advice are protected by solicitor client privilege because they are related to the seeking, formulating or giving of the legal advice.[21]

[25] Therefore, I find that the Ministry is authorized to refuse the applicant access to the information at issue under s. 14, as it is protected by solicitor client privilege.

Section 22 – unreasonable invasion of personal privacy

[26] The information withheld under s. 22 consists of information received from the RCMP, as well as names, drivers' licences and other information about individuals who received one of the invalid IRPs. Numerous orders have considered the application of s. 22, and I will apply those same principles in my analysis.[22]

Personal Information

[27] The first step in any s. 22 analysis is to determine if the information is personal information. "Personal information" is defined 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."[23]

[28] Based on my review of the records, I find that all of the information withheld under s. 22 is personal information about identifiable individuals.

[29] The applicant states that he does not seek personal information about individuals who received IRPs. He says that he is only interested in material withheld under s. 22 if it is also withheld under s. 16(1)(b).[24] Therefore, from this point forward in the s. 22 analysis, I will only address the information being

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[21] See, for example, Order 04-25, 2004 CanLII 45535 (BC IPC), para. 104; Order F13-29, 2013 BCIPC 38 (CanLII), para. 18; Order F16-26, 2016 BCIPC 28 (CanLII), para. 32.
[22] See, for example, Order 01-53, 2001 CanLII 21607, p. 7.
[23] See Schedule 1 of FIPPA for these definitions.
[24] Applicant submissions, paras. 26 and 27.

withheld under both s. 22 and s. 16(1)(b).[25] Any information withheld exclusively under s. 22 is clearly not in dispute, and I make no finding about whether disclosing it would be an unreasonable invasion of third party personal privacy.

Section 22(4)

[30] The second 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.

[31] The Ministry submits that none of the subsections in s. 22(4) apply to the personal information in this case.[26] The applicant submits that s. 22(4)(e) applies because it relates to "an action taken in relation to a member of that agency [the RCMP] and their position as a result of the [technical problem with the equipment]."[27] I understand the applicant to be asserting that any disciplinary or other sanction imposed on a particular RCMP officer falls under the exemptions set out in s. 22(4)(e) and there is therefore a presumption that it should be disclosed.

[32] Section 22(4)(e) states that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if 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. Past orders have said that s. 22(4)(e) applies to the following:

> … any third-party identifying information that in some way relates to the third party's job duties in the normal course of work-related activities…. I refer here to objective, factual statements about what the third party did or said in the normal course of discharging her or his job duties, but not qualitative assessments or evaluations of such actions.[28]

[33] After reviewing the records, I find that the withheld information is not related to something said or done in the normal course of an employee discharging his or her job duties, but rather contains an assessment or evaluation about an employee. Therefore, I find that s. 22(4)(e) does not apply in this situation. I also find that no other parts of s. 22(4) are relevant here.

Presumptions – Section 22(3)

[34] The third step in a s. 22 analysis is to determine whether any of the presumptions in s. 22(3) apply, in which case disclosure is presumed to be an

[25] Records: pp. 29 – 33.
[26] Ministry's submissions, para. 44.
[27] Applicant's submissions, para. 28.
[28] See, for example, Order 01-53, 2001 CanLII 21607 (BC IPC), para. 40.

unreasonable invasion of third party privacy. However, such presumptions are rebuttable.

[35] The Ministry submits that s. 22(3)(d) applies to the personal information in this case.[29] The applicant does not provide any submissions regarding s. 22(3).

[36] Section 22(3)(d) states that disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if it relates to employment, occupational or educational history.

[37] Past orders have held that employee personal information collected as part of a workplace investigation constitute their employment history in accordance with s. 22(3)(d).[30] In this situation, the information does not occur within the context of a formal investigation; however, an investigation into the technical problem with the equipment clearly did occur and the withheld information relates to a RCMP member's employment history, as it is a qualitative assessment of certain job duties.[31] Therefore, I find there is a presumption that disclosure of this information would be an unreasonable breach of the RCMP member's personal privacy.

Relevant Circumstances – Section 22(2)

[38] The next 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 listed in s. 22(2).

[39] The applicant does not make any specific submissions regarding s. 22(2). However, based on his general submissions, it appears that he takes the position that s. 22(2)(a) applies. Section 22(2)(a) states that:

> (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,

[40] The rationale for s. 22(2)(a) is that subjecting the activities of a public body to public scrutiny may support disclosure of third party personal information

[29] Ministry's submissions, paras. 46 and 47.
[30] See, for example, Order F11-04, 2011 BCIPC 4 (CanLII), para. 16 and the orders cited in footnote 10.
[31] Order 01-53, 2001 CanLII 21607 (BC IPC), para. 40.

where disclosure of the information would foster the accountability of a public body.[32]

[41] In these circumstances, I find that s. 22(2)(a) does not weigh in favour of disclosure of the personal information. This is because s. 22(2)(a) relates to scrutiny of a public body rather than an individual.[33] The information in dispute in this situation is only about the employee, and it reveals no information that could be said to be useful in subjecting the Ministry's activities to public scrutiny.

[42] I also find that no other parts of s. 22(2) are relevant here, and there are no other relevant circumstances to consider.

Conclusion – Section 22(1)

[43] I have found that the information withheld under s. 22 is "personal information". For the subset of the personal information that the applicant said he seeks, I find that there are no provisions in ss. 22(4) and 22(2) that apply. I have also found that s. 22(3)(d) does apply, and the applicant has not provided evidence to rebut the presumption that disclosure of the information would be an unreasonable invasion of personal privacy. Therefore, the Ministry is required to withhold the personal information in question.

Section 16(1)(b) – reveal information received in confidence

[44] As I have already determined that the information withheld under s. 16(1)(b) must be withheld under s. 22, I do not have to consider whether s. 16 also applies to the information.

CONCLUSION

[45] I confirm the Ministry of Justice's decision to withhold the information from the applicant and find that the Ministry is authorized by s. 14 and required by s. 22 to withhold all of the information in dispute.

June 6, 2017

ORIGINAL SIGNED BY

Carol Whittome, Adjudicator

OIPC File No.: F15-63386

[32] Order F05-18, 2005 CanLII 24734.
[33] Order F12-12, 2012 BCIPC 17 (CanLII), para. 38.