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INFORMATION & PRIVACY
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Order F17-40

BRITISH COLUMBIA TRANSIT CORPORATION

Celia Francis
Adjudicator

September 25, 2017

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Summary: A BC Transit driver requested the dates of hire of his fellow drivers to pursue a dispute with his union over seniority lists. BC Transit refused access to the information under s. 22(1) of the *Freedom of Information and Protection of Privacy Act* (disclosure would be an unreasonable invasion of third-party privacy). The adjudicator found that s. 22(1) applies to the dates of hire and ordered BC Transit to refuse access to them.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(2), 22(1), 22(2)(a), 22(2)(c), 22(3)(d), 22(3)(j).

Authorities Considered: BC: Order F15-03, 2015 BCIPC 3 (CanLII); Order F10-21, 2010 BCIPC 32 (CanLII); Order F17-02, 2017 BCIPC 02 (CanLII); Order F14-22, 2014 BCIPC 25 (CanLII); Order F09-24, 2009 CanLII 66961 (BC IPC); Order 01-07, [2001] B.C.I.P.C.D. No. 7; Order F14-24, 2014 BCIPC 27 (CanLII); Order 01-27, 2001 CanLII 21581 (BC IPC).

Cases Considered: *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8 (CanLII).

INTRODUCTION

[1] This case arises out of a dispute over employee seniority between employees of the British Columbia Transit Corporation (Victoria) (BC Transit) and Unifor Local No. 333-BC (Unifor 333). In mid-2016, the applicant, a BC Transit driver, made a request under the *Freedom of Information and*

Protection of Privacy Act (FIPPA) to BC Transit for the names and dates of hire of other drivers.

[2] BC Transit said it would provide the names of the drivers but denied access to their dates of hire under s. 22(3)(d) of FIPPA.¹ The applicant requested a review of BC Transit's decision by the Office of the Information and Privacy Commissioner (OIPC). Mediation by the OIPC did not resolve the request for review and the matter proceeded to inquiry.

ISSUE

[3] The issue before me is whether BC Transit is required by s. 22(1) of FIPPA² to deny the applicant access to the dates of hire of its drivers. Under s. 57(2) of FIPPA, it is up to the applicant to prove that disclosure of the information in dispute would not be an unreasonable invasion of third-party personal privacy.

DISCUSSION

Preliminary issue

BC Transit submitted that the question of whether or not it is obliged to produce the personal information at issue has been resolved in a Labour Relations Board (LRB) proceeding. BC Transit noted that the applicant's request for the information will be dealt with in an associated judicial review proceeding, which is governed by the BC Supreme Court Civil rules, including those dealing with the production of documents. BC Transit submitted that the applicant's request is a collateral attack on the LRB's findings and therefore an abuse of process.³

[4] I do not agree with that view. The applicant's request is not an abuse of process simply because there may be another possible way for him to acquire the requested information. The adjudicator in Order F14-24⁴ rejected a similar argument:

[27] In my view, BCSC's submissions on this point equate to an argument that using FIPPA to seek information beyond that which is available through BCSC's hearing disclosure process is an abuse of FIPPA. I cannot agree with this stance. In previous orders, the Commissioner has explicitly rejected the notion that discovery under the *Rules of Court* or some other process displaces the right of access under

¹ Disclosure of information about employment history would be an unreasonable invasion of third-party privacy.

² This section requires a public body to refuse access to personal information where its disclosure would be an unreasonable invasion of third-party privacy.

³ BC Transit's reply submission, pp. 5-6.

⁴ Order F14-24, 2014 BCIPC 27 (CanLII), with reference to Order 01-27, 2001 CanLII 21581 (BC IPC).

FIPPA.⁵ For example, in Order 01-27, former Commissioner Loukidelis stated:

Section 2(2) of the Act provides that the Act does not replace other procedures for access to information. By the same token, the existence of other procedures for access to information does not oust, or circumscribe, the rights of access afforded under the Act unless the Act is explicitly overridden or ousted... [footnote omitted]

[28] In other words, FIPPA provides statutory rights of access to information independent of disclosure procedures under the *Securities Act* and BCSC's internal hearing disclosure process. The fact that the respondent seeks access through FIPPA to information that was unavailable to him through BCSC's hearing disclosure process because BCSC found it was irrelevant to its proceedings is not, in the circumstances of this case, an abuse of FIPPA or grounds for relief under s. 43(b).

[5] BC Transit also argued that the OIPC does not have authority to challenge or review the LRB's decision.⁶

[6] I agree that FIPPA does not provide the Commissioner with the power to review or critique the decisions of the LRB. That is not the purpose of this inquiry, which is being conducted under Part 5 of FIPPA. Rather, I am reviewing BC Transit's decision to deny access to the requested information under s. 22 of FIPPA. I therefore do not agree that the applicant's request is an abuse of process under FIPPA.

Background

[7] Up to 2015, BC Transit had two types of drivers: transit operators who operated large buses (TOs) and community transit operators who drove smaller community shuttle buses (CTOs). Both types of driver were in the Unifor 333 bargaining unit. Under the collective agreement in effect until 2015, TOs were paid more than CTOs because it was accepted that operating a large bus was a greater challenge than operating a community shuttle. TOs and CTOs accrued seniority in their respective positions from their dates of hire. When a CTO was promoted to TO, he or she was placed at the bottom of the TO seniority list. The applicant and about 75 others transitioned to TOs under those rules.

[8] In 2015, the collective agreement was renegotiated and the rules changed. Among other things, the new agreement eliminated the distinction between TOs and CTOs. Under that agreement, CTOs could make the transition

⁵ See for example: Order F02-07, 2002 CanLII 42432 (BC IPC), para. 20; Order 02-23, 2002 CanLII 42448 (BC IPC), pp.4-5; and Order 00-07, 2000 CanLII 7711 (BC IPC), pp.14-15.

⁶ BC Transit's reply submission, pp. 5-6.

to Transit Operators, if they met the qualifications.⁷ In addition, the seniority of CTOs who moved was blended (“dovetailed”) into the seniority list of the existing TOs.⁸ Approximately 65 CTOs made the transition to TOs under the 2015 collective agreement.

[9] The applicant and other TOs who were promoted from CTO prior to 2015 were unhappy that their seniority had not been similarly recognized. They believed that the transitioning CTOs had “leapfrogged” over them in the TO seniority list and that this has negatively affected their work assignments. They complained about the new seniority arrangement to the LRB, arguing that Unifor 333 had been arbitrary and discriminatory, and had acted in bad faith.⁹ The LRB adjudicator dismissed the complaint. An LRB panel denied the complainants’ application for reconsideration of the LRB adjudicator’s decision. In September 2016, the complainants filed a petition in the BC Supreme Court, seeking an order to set aside the LRB’s decision.¹⁰

Information in dispute

[10] The information in dispute is the dates of hire of BC Transit’s Victoria Transit Operators. BC Transit refuses to disclose this information under s. 22(1) of FIPPA.

[11] BC Transit also proposes to apply s. 22(1) to the TOs’ employee numbers and, in a few cases, to information about some TOs’ status (e.g., on sick leave). The applicant did not request these two types of information. Therefore, I conclude that that part of BC Transit’s decision is not in dispute and I will not consider it.¹¹

Third-party privacy – s. 22(1)

[12] 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

⁷ If not, they were found other opportunities or their employment was terminated.

⁸ Former CTOs, such as the applicant, who had transitioned to TOs before the 2015 collective agreement, maintained their seniority according to the former rules.

⁹ Applicant’s response submission, p. 4.

¹⁰ This background information is drawn from the LRB decision and the petition, which BC Transit provided with its reply submission. The petition includes a request that the Court order BC Transit to produce the TOs’ dates of hire.

¹¹ The applicant confirmed in his response submission, at pp. 1-2, that he only wanted the names and dates of hire of the Victoria Transit Operators.

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.¹²

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

Is the information “personal information”?

[14] FIPPA defines “personal information” as recorded information about an identifiable individual, other than contact information.¹³ BC Transit argued that the dates of hire of the TOs are their personal information.¹⁴ The applicant did not expressly discuss this issue but his submission indicates that he too considers the dates of hire to be the TOs' personal information.

[15] The information in dispute is about the TOs as identifiable individuals and is clearly not contact information. Therefore, I find that it is personal information.

Does s. 22(4) apply?

[16] 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 applicant argued that s. 22(4)(e) encompasses dates of hire¹⁵ while BC Transit argued that s. 22(4)(e) does not.¹⁶

[17] Under s. 22(4)(e), it is not an unreasonable invasion of third-party privacy to disclose information about an individual's position, functions or remuneration as an officer, employee or member of a public body. Past orders have held that s. 22(4)(e) covers information such as the name, title and remuneration (including severance payments) of a public body employee, as well as information on the duties or responsibilities of a public body employee. They 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).¹⁷

¹² Order F15-03, 2015 BCIPC 3 (CanLII), at para. 58.

¹³ 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.

¹⁴ BC Transit's initial submission, p. 2.

¹⁵ Applicant's response submission, p. 8.

¹⁶ BC Transit's initial submission, p. 2.

¹⁷ 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.

[18] The applicant pointed to *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)* [RCMP]¹⁸ in support of his position that s. 22(4)(e) applies. RCMP dealt with whether the information in dispute in that case met the definition of personal information in s. 3 of the federal *Privacy Act*.¹⁹ The information at issue in that case was RCMP members' historical postings (their status and date); the list of ranks and the dates they achieved those ranks; their years of service; and their anniversary dates of service. The Court held that this information is the type of information that s. 3(j) says is excluded from the definition of personal information in the *Privacy Act*. The Court ultimately found that the information could not be withheld under 19(1) of the federal *Access to Information Act*.

[19] RCMP does not assist the applicant in his argument that s. 22(4)(e) of FIPPA applies. RCMP was largely about the definition of personal information in the federal *Privacy Act*. The definition of personal information in FIPPA is not the same. Besides, I note that the applicant did not actually dispute that the information here meets the definition of personal information in FIPPA.

[20] The information in dispute does not relate to the TOs' "position, functions or remuneration", as past BC orders have interpreted those terms. Rather, the information relates to their employment history as individuals. Past BC orders have found that this type of employment history information falls under s. 22(3)(d), as I discuss below, not s. 22(4)(e).

[21] For reasons given above, I find that s. 22(4)(e) does not apply to the information in dispute. There is no basis for finding that other parts of s. 22(4) apply here either.

Presumed unreasonable invasion of third-party privacy – s. 22(3)

[22] 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. BC Transit argued that ss. 22(3)(a), (d) and (j) apply to the dates of hire. These provisions read as follows:

22 (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

¹⁸ *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8 (CanLII).

¹⁹ The definition of personal information in the *Privacy Act* excludes: the fact that the individual is or was an officer or employee of the government institution; the title, business address and telephone number of the individual; the classification, salary range and responsibilities of the position held by the individual; the name of the individual on a document prepared by the individual in the course of employment; and the personal opinions or views of the individual given in the course of employment. See s. 3(j) of the *Privacy Act*.

- (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
- ...
- (d) the personal information relates to employment, occupational or educational history,
- ...
- (j) the personal information consists of the third party's name, address, or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

[23] BC Transit argued that the dates of hire are part of the TOs' employment history.²⁰ The information in dispute specifies the dates on which the TOs were hired by BC Transit. It is similar in character to the kind of work history information that past orders have found falls under s. 22(3)(d).²¹ I find that s. 22(3)(d) applies to the dates of hire and their disclosure is presumed to be an unreasonable invasion of third-party privacy.

[24] BC Transit also argued that the dates of sick or other leave are part of the TOs' medical and employment history and that ss. 22(3)(a) and (d) therefore apply to this information.²² As previously stated, the applicant said he does not want sick leave or similar dates. Therefore, I need not consider whether ss. 22(3)(a) and (d) apply to this information.

[25] BC Transit suggested that the applicant may wish to use the information to solicit the TOs' support in his dispute with the union. Thus, in its view, s. 22(3)(j) cannot be ignored.²³ The applicant has, however, explicitly stated he wants the information to pursue his dispute with Unifor 333.²⁴ There is no indication that he wishes to use the information as BC Transit suggested. It is also not clear how the dates of hire would assist the applicant in contacting his fellow employees. Moreover, the applicant's submission shows that he is already capable of contacting his fellow employees without knowing their dates of hire. I find that s. 22(3)(j) does not apply to the information in dispute.

Relevant circumstances – s. 22(2)

[26] In determining whether disclosure of personal information is an unreasonable invasion of third-party personal privacy under s. 22(1) or 22(3), a public body must consider all the relevant circumstances, including those set

²⁰ BC Transit's initial submission, p. 3.

²¹ See, for example, Order F17-02, 2017 BCIPC 02 (CanLII), Order F14-22, 2014 BCIPC 25 (CanLII), Order F15-03 and Order F09-24, 2009 CanLII 66961 (BC IPC).

²² BC Transit's initial submission, p. 3; BC Transit's reply submission, p. 7.

²³ BC Transit's initial submission, p. 3.

²⁴ Applicant's response submission, p. 4.

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 these provisions:

- 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,
...
 - (c) the personal information is relevant to a fair determination of the applicant's rights,
...

[27] **Public scrutiny** – The applicant said that BC Transit and Unifor 333 signed a “contentious” letter of agreement which, he said, “interfered” in the placements on the seniority list, causing “tangible harm to at least 75” Victoria TOs. In his view, it is appropriate to subject BC Transit’s management of its employees to public scrutiny through the release of the dates of hire.²⁵

[28] BC Transit said that BC Transit has “very little role” in the applicant’s dispute with Unifor 333. It argued that it is the union’s conduct, not BC Transit’s, that would be made subject to public scrutiny, so s. 22(2)(a) is not engaged.²⁶

[29] The memorandum of agreement between BC Transit and Unifor 333 on the new collective agreement states that the seniority of transitioning CTOs would be blended with that of existing TOs. It also states that Unifor 333 had final approval of seniority placements.²⁷ This indicates to me that, while BC Transit played a role, in that it agreed to the blending of the seniority lists, Unifor 333 had the final say on who was placed where. Indeed, it is clear from the applicant’s submission, the LRB decision and the petition to the BC Supreme Court that his principal grievance is with Unifor 333’s conduct, not BC Transit’s. In this light, I do not see how disclosure of the dates of hire would assist in subjecting BC Transit’s conduct to public scrutiny. I find that s. 22(2)(a) does not apply here.

²⁵ Applicant’s response submission, pp. 8-9.

²⁶ BC Transit’s initial submission, pp. 3-4.

²⁷ Page 19 of the Memorandum of Agreement between BC Transit and Unifor 333; attachment 2, applicant’s response submission.

[30] **Applicant's rights** – In Order 01-07,²⁸ former Commissioner Loukidelis set out the following test for determining whether of s. 22(2)(c) applies in a given case:

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.²⁹

[31] The applicant stated that, when Unifor 333 created the “bizarre” new seniority list in September 2015, it “unfairly” “bumped” 75 drivers from their seniority positions “by putting less qualified and experienced drivers ahead of them”. The applicant said he is leading a legal challenge in BC Supreme Court against Unifor 333’s actions in an effort to resolve this dispute. He said he cannot “properly and fairly pursue legal remedies to the unjust and inequitable seniority list created by the union without access to the dates of hire data that the union used to create the list”.³⁰ BC Transit said that the dates of hire are not necessary for the determination of the applicant’s rights in a legal proceeding because they are not relevant.³¹

[32] The LRB adjudicator assumed for the purposes of his decision that some transitioning CTOs were placed above some former CTOs in the seniority list when they were dovetailed with TOs.³² I infer from this that the LRB adjudicator did not consider the TOs’ individual dates of hire to be necessary in arriving at his findings. Indeed, BC Transit said that the applicant requested the dates of hire in the LRB proceeding and the LRB adjudicator denied his request on the basis that the information was not relevant.³³

²⁸ Order 01-07, [2001] B.C.I.P.C.D. No. 7.

²⁹ Following Ontario Order P-651, [1994] O.I.P.C. No. 104, the former Commissioner found that s. 22(2)(c) would apply only where all of the listed circumstances exist.

³⁰ Applicant’s response submission, pp. 3, 4. The applicant provided the BC Supreme Court registry number in his submission.

³¹ Para. 25, LRB decision.

³² LRB decision, para. 25.

³³ BC Transit’s reply submission, pp. 3-5.

[33] In any case, the applicant's submission shows that he is already aware of at least some dates of hire of his fellow TOs. There is also no dispute that the seniority lists were dovetailed. Indeed, the applicant gave examples of cases where transitioning CTOs were placed above him and other former CTOs in the seniority list. He also described the effects that the supposed "bumping" has had on the former CTOs and their work.³⁴ These factors suggest that, for the LRB proceeding, the applicant was able to present his argument about the alleged unfairness of the seniority list without knowing every affected individual's date of hire. I do not understand why he needs to know his co-workers' dates of hire in order to advance his case in his upcoming BC Supreme Court action. He does not adequately explain.

[34] For these reasons, I am not persuaded by the applicant's submissions that the requested information is necessary or relevant to a fair determination of any legal rights he may have. I find that s. 22(2)(c) does not apply here.

Conclusion on s. 22(1)

[35] I found above that the dates of hire are personal information that falls under s. 22(3)(d). I also find that the relevant circumstances do not favour disclosure of the information. There are no relevant circumstances rebutting the presumption in s. 22(3)(d). The applicant has not met his burden of proof in this case. I find that s. 22(1) applies to the dates of hire.

CONCLUSION

[36] For reasons given above, under s. 58(2)(c), I require BC Transit to refuse the applicant access to the information in dispute.

September 25, 2017

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File No.: F16-66747

³⁴ Applicant's response submission, p. 3; Attachment 1, "summary of seniority bumping".