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Order F18-48

VANCOUVER POLICE DEPARTMENT

Celia Francis
Adjudicator

November 21, 2018

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Summary: The applicant requested Vancouver Police Department (VPD) files about himself for the period 2003 onwards. The VPD disclosed most of the information in the responsive records, withholding some information under s. 22(1) (harm to third-party privacy). The adjudicator found that s. 22(1) applied to all of the withheld information, with the exception of the identities of some of the third parties and a small amount of background information about them.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 4(2), 22(1), 22(2)(e), 22(2)(f), 22(2)(h), 22(3)(b), 22(5).

INTRODUCTION

[1] This case concerns a request for access to police files. In early 2017, the applicant made a request to the Vancouver Police Department (VPD) under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for all records related to him, from 2003 onwards. The VPD disclosed records to him, withholding some information under ss. 15 (harm to law enforcement), 16 (harm to intergovernmental relations) and 22 (harm to third-party personal privacy) of FIPPA. The applicant requested a review of the VPD's response by the Office of the Information and Privacy Commissioner (OIPC). He complained that the VPD had not provided all of the records he had requested and also said that some information had been withheld improperly. Mediation by the OIPC was not successful and the matter proceeded to inquiry.

[2] The VPD's initial submission did not address ss. 15 and 16 but relied only s. 22. It thus appears that the VPD dropped ss. 15 and 16 at some point before the inquiry took place.¹ I need only consider VPD's application of s. 22, as a result.

ISSUE

[3] The issue before me is whether the VPD is required by s. 22 to withhold information. Under s. 57(2) of FIPPA, it is up to the applicant to prove that disclosure of the withheld information would not be an unreasonable invasion of third-party privacy.

DISCUSSION

Preliminary issue

[4] The applicant's request for review and his initial submission both complained that the VPD had not provided all of the records he requested. The VPD objected, saying this issue was not included in the investigator's fact report or the notice of inquiry.²

[5] The OIPC's usual practice is to investigate and dispose of such complaints, without the need for an inquiry. There is no information before me to indicate that this did not occur with the applicant's complaint about the VPD's search. In addition, the fact report and the notice of inquiry do not refer to this complaint as an issue to be decided here. Therefore, I do not consider the complaint about the adequacy of the VPD's search for records to be an issue that is properly before me in this inquiry and I will not consider it.

[6] If the applicant is still dissatisfied with the VPD's search, his proper recourse at this point is to bring his concerns directly to the OIPC's investigation section. He is also free to pursue his complaint directly with the VPD.³

Records at issue

[7] The VPD retrieved 94 pages of responsive records, principally occurrence reports about various incidents involving the applicant, spanning the years

¹ The VPD's initial submission (at para. 2) also stated that it disclosed more information to the applicant in August 2018.

² VPD's reply submission, paras.1-2.

³ The VPD said that some of the information the applicant provided in his response submission would have been helpful to the VPD in its search for records. It offered to work with the applicant in a further search, "outside the inquiry process," if he contacted the VPD; VPD's reply submission, paras.1-2. The VPD could, of course, do another search, without waiting for the applicant to contact it.

2004-2010. The VPD disclosed these pages in severed form, withholding some information under s. 22(1). The withheld information is the information in dispute.

Unreasonable invasion of third-party privacy - s. 22(1)

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

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.⁴

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

Is the information “personal information”?

[10] FIPPA defines “personal information” as recorded information about an identifiable individual, other than contact information. “Contact information” is defined in Schedule 1 of FIPPA 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.”

[11] The VPD said that the “vast majority” of the withheld information is about third-party individuals who were complainants, witnesses, victims or persons of interest in the VPD’s investigations involving the applicant.⁵ The applicant did not specifically address this point.

[12] Some of the withheld information is about identifiable individuals other than the applicant. The information includes their names, addresses, physical characteristics and comments about what these individuals said and did, as well as a small amount of background information about them. Some of the withheld information is about both the applicant and another individual. It is all recorded

⁴ Order F15-03, 2015 BCIPC 3 (CanLII), at para. 58.

⁵ VPD’s initial submission, paras. 4, 12-13, 24.

information about identifiable individuals that is not contact information. I therefore find that all of the withheld information is personal information.

Does s. 22(4) apply?

[13] Neither the VPD nor the applicant addressed this provision. There is, however, no basis for finding that s. 22(4) applies here. The personal information does not, for example, relate to any third party's position, functions or remuneration as an officer, employee or member of a public body (s. 22(4)(e)).

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

[14] The VPD argued that all of the withheld information falls under s. 22(3)(b), which 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 ...

(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,

...

[15] In the VPD's view, "it is clear" that the withheld information was "compiled as part of an investigation into a possible violation of law."⁶ Although the VPD did not say so explicitly, I infer that it meant the investigation was under the *Criminal Code*.⁷ The applicant did not address s. 22(3)(b).

[16] I am satisfied that the records relate to criminal investigations that the VPD undertook. The third-party personal information was clearly compiled and is identifiable as part of a police investigation into a possible violation of law. I find, therefore, that s. 22(3)(b) applies to this information. This means its disclosure is presumed to be an unreasonable invasion of third-party privacy.

⁶ VPD's initial submission, paras. 17, 20.

⁷ For example, the VPD referred at para. 22 of its initial submission to Order F05-24, 2005 CanLII 28523 (BC IPC), a case involving the Abbotsford Police Department, in which former Commissioner Loukidelis found that the withheld information was compiled and identifiable as part of an investigation under the *Criminal Code* and that s. 22(3)(b) therefore applied to the information.

Relevant circumstances

[17] The VPD said that the relevant circumstances “do not temper the presumption in s. 22(3)(b).”⁸ It raised the following provisions in s. 22(2) as being relevant in this case:

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,

...

(e) the third party will be exposed unfairly to financial or other harm,

(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,

...

Fair determination of applicant’s rights – s. 22(2)(c)

[18] The VPD said that this factor was not present in this case.⁹ The applicant did not comment on this issue.

[19] Past orders have set out a four-part test to determine whether s. 22(2)(c) applies:

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.¹⁰

⁸ VPD’s initial submission, para. 23.

⁹ VPD’s initial submission, para. 23. VPD’s reply submission, para. 7.

¹⁰ See, for example, Order 01-07, 2001 CanLII 21561 (BC IPC), at para. 31.

[20] The records concern incidents that happened many years ago. The applicant said nothing that indicates that he is, or will be, participating in a proceeding that is related to these or any other incidents. I find that s. 22(2)(c) does not apply here.

Unfair exposure to harm and damage to reputation – ss. 22(2)(e) and (h)

[21] The VPD said that “[d]isclosure of this third party information, and its association to the Applicant and his criminal background and the circumstance of each police file, could reasonably be expected, however, to expose third parties unfairly to harm, and unfairly damage their reputation”. The VPD argued that “it is an unreasonable invasion of privacy of each third party to release their names and their association to the police files and the Applicant, as contained in the Responsive Records, where this information could easily and foreseeability [sic] form a part of unending recorded internet with its perpetual linkages and indexing.”¹¹ The applicant did not comment on this factor.

[22] Pages 6-11 and 50-53 – The withheld information on these pages includes brief descriptions of the background of named third parties who were found in the applicant’s company. VPD has already disclosed sufficient information about the incidents that the applicant will undoubtedly be able to recall the third parties’ identities. VPD disclosed that it did not charge these third parties as a result of these incidents and the small amount of withheld information is not about sensitive matters. Some of the withheld information on pages 6-11 is already known to the applicant and the public, as evidenced by the court decisions the VPD drew to my attention. I am, therefore, not persuaded that disclosure of these individuals’ identities and the background information about them could reasonably be expected to cause them harm under s. 22(2)(e) or (h).

[23] However, I find that s. 22(2)(e) applies to the balance of the withheld information on these pages, specifically the address, telephone number, date of birth, driver’s licence number, height, weight and ethnicity of each third party. The VPD did not elaborate on how someone could use such information to cause harm to the third parties under ss. 22(2)(e) and (h). In my view, however, disclosing this combination of personal detail could reasonably be expected to unfairly expose the third parties to identity theft and financial loss, for the purposes of s. 22(2)(e).

[24] Pages 60-76 – The withheld information on these pages relates to an individual’s discussions with the police about an incident involving the applicant. It includes personal details about this person and other people, such as their addresses, dates of birth, ethnicity and driver’s licence numbers. It also includes information that the individual provided to the police about the incident. I cannot say much about the harm without revealing the withheld information. However,

¹¹ VPD’s reply submission, para. 7.

given the sensitive character of the information (it describes the incident, the applicant's past behaviour towards this individual and the relationship between this individual and the applicant), I consider that its disclosure could reasonably be expected to result in harm for the purposes of ss. 22(2)(e) and (h). These factors favour withholding the information at issue.

Supply in confidence - s. 22(2)(f)

[25] The VPD submitted that it is clear from the records that the third parties supplied the withheld personal information in confidence.¹² The applicant rejected this argument regarding the withheld information on pages 6-11 and 50-53 (*i.e.*, the information about the third parties found in the applicant's company), noting that the applicant was present during the incidents in question.¹³ The applicant did not discuss this factor regarding pages 60-76.

[26] From the nature of the incidents and the character and content of all of the withheld information (particularly on pages 60-76), I accept that the third parties provided personal information to the police in confidence. This factor favours withholding the information at issue.

Applicant's knowledge of information

[27] The fact that an applicant is aware of or already knows the personal information in issue can be a relevant circumstance. This factor may or may not favour disclosure, depending on the case.¹⁴

[28] The applicant said he is aware of the identities of the third parties mentioned in the records because "he was present, so he knows what took place and who was there."¹⁵ The VPD rejected this argument, saying that "as the Applicant is apparently aware of the names of the redacted third parties, as they were present in the car with him or at a restaurant with him, or in a relationship with him, there is no substantive or material information that he will gain from the disclosure."¹⁶

[29] Pages 6-11 and 50-53 – I accept that the applicant is aware of the names of the third parties in question because he was present during these incidents. I also accept that the applicant is aware of the background information about the third party named on pages 6-11, given the information in the court cases

¹² VPD's initial submission, para. 25.

¹³ Applicant's response submission, paras. 13.a.-c.

¹⁴ See, for example, Order F17-06, 2017 BCIPC 07 (CanLII), Order F15-14, 2015 BCIPC 14 (CanLII), Order 03-24, 2005 CanLII 11964 (BC IPC), Order F10-41, 2010 BCIPC No. 61, and Order F17-02, 2017 BCIPC 02 (CanLII).

¹⁵ Applicant's response submission, paras. 13 & 14.

¹⁶ VPD's reply submission, para. 7.

mentioned above. It is not, however, clear that he knows the third parties' personal details (*i.e.*, address, telephone number, date of birth, driver's licence number, height, weight and ethnicity.)

[30] Pages 60-76 – I accept that the applicant is likely aware of the identity of one individual who provided the police with information about an incident involving the applicant. There is, however, no indication that he knows this individual's personal details or what this individual said to the police about the incident. There is also no indication that he knows the identities of other individuals mentioned on these pages or their personal details.

Age of records

[31] The applicant argued that the records are “historic” and that there are “no ongoing investigations.” In the applicant's view, this means that it is possible for him to receive the “redacted information” without unreasonably invading third-party privacy.¹⁷ The VPD did not explicitly comment on this argument.

[32] I agree the records concern incidents going back many years. There is also no indication that the police are currently investigating these incidents. This factor favours disclosure to some extent.

Publication of information on internet

[33] The VPD argued the applicant could publish or post the information on the internet and that this was a relevant factor to consider. The VPD said that, if the information were posted on the internet, the ease with which it could be searched, disseminated or linked should form part of this assessment. In the VPD's view, this factor favours withholding the information. The VPD also admitted that there was no indication that the applicant plans to post the information on the internet.¹⁸ The applicant did not deal with this issue.

[34] FIPPA imposes no restrictions on an applicant's use of information, so the potential for further disclosure exists with respect to records disclosed in response to any request under FIPPA. Moreover, the applicant could, if he wished, publish or post information on the internet about the third parties without the benefit of the withheld information. I do not consider the VPD's argument persuasive. I note that the adjudicator in Order F11-06¹⁹ rejected a similar argument from the VPD.

¹⁷ Applicant's response submission, para. 7.

¹⁸ VPD's reply submission, paras. 4-5, 9, 17.

¹⁹ Order F11-06, 2011 BCIPC 7 (CanLII).

Conclusion under s. 22(1)

[35] I found above that the withheld information all falls under s. 22(3)(b). I considered the following relevant circumstances: whether disclosure would unfairly expose the third parties to financial or other harm (s. 22(2)(e)) or damage their reputations (s. 22(2)(h)); whether the information was supplied in confidence (s. 22(2)(f)); whether the information was sensitive; the age of the records; whether the information was publicly available; and whether it was apparent that the applicant already knows the information.

[36] Pages 6-11 and 50-53 – The applicant’s knowledge of the identities of the third parties favours disclosing this information. The applicant’s knowledge of the background information on the third party named on pages 6-11, together with the public availability of this information (through court decisions), also favours disclosing this third-party information. In addition, I consider the small amount of withheld background information about the third parties named on pages 50-53 is not sensitive. The age of these records also favours disclosure of this withheld information. In my view, these factors rebut the presumption in s. 22(3)(b). The applicant has met his burden of proof respecting this information. I find that s. 22(1) does not apply to it.

[37] However, there is no evidence that the applicant knows the third parties’ personal details (*i.e.*, address, telephone number, date of birth, driver’s licence number, height, weight and ethnicity). The factors in s. 22(2)(e) and (f) favour withholding these individuals’ personal information. The age of the records does not override the other circumstances that indicate that disclosure would be an unreasonable invasion of third-party personal privacy. The s. 22(3)(b) presumption has not been rebutted. The applicant has not met his burden of proof respecting this information. I find that s. 22(1) applies to it.

[38] Pages 60-76 – Sections 22(2)(e), (f) and (h) favour withholding the information at issue on these pages, as do its sensitive character and content. In my view, the applicant’s apparent awareness of the identity of an individual who provided information to the police, and the age of the records, do not rebut the presumption in s. 22(3)(b) and do not outweigh the relevant circumstances favouring withholding the information on these pages. The applicant has not met his burden of proof respecting this information. I find that s. 22(1) applies to the withheld information on these pages.

Severing under s. 4(2) – applicant’s own personal information

[39] Section 4(2) of FIPPA states that, where it is reasonable to sever excepted information from a record, an applicant has the right of access to the remainder. A number of orders have considered the issue of joint or “inextricably intertwined” personal information of two or more individuals. They have generally found that it is not reasonable to separate an applicant’s personal information

from a third party's personal information in such cases and that disclosing the joint personal information would be an unreasonable invasion of third-party privacy.²⁰

[40] The withheld information on pages 60-76 does include some information about the applicant. However, it is inextricably intertwined with a third party's personal information. It would not, in my view, be possible to disclose the applicant's own personal information to him without also disclosing the personal information of the third party. I noted above that disclosure of the third party's personal information to the applicant would be an unreasonable invasion of the third party's privacy. I find that it is not reasonable to sever the third party's personal information from the records in dispute and disclose the remainder to the applicant.

Summary under s. 22(5)

[41] Under s. 22(5), a public body must create a summary of an applicant's personal information, where it was provided in confidence, if the summary can be prepared without revealing the identity of a third party who provided the information. The applicant suggested that the VPD could prepare a summary of the information withheld on pages 75-76, under s. 22(5) of FIPPA.²¹

[42] Only a small amount of the withheld information on pages 75-76 is about the applicant. It would not, in my view, be possible to prepare a meaningful summary of these passing references, without disclosing the identities of third parties who supplied the information in confidence.

CONCLUSION

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

1. Subject to item 2 below, under s. 58(2)(c) of FIPPA, I require the VPD to refuse the applicant access to the information it withheld under s. 22(1).
2. Under s. 58(2)(a) of FIPPA, I require the VPD to give the applicant access to some of the information it withheld under s. 22(1) on pages 6-11 and 50-53, specifically the identities of the third parties mentioned on these pages and the small amount of information on their backgrounds. For clarity, I have provided the VPD with copies of these pages with this information highlighted in pink. The VPD must give the applicant access to this information by January 7, 2019. The VPD must concurrently copy the

²⁰ See, for example, Order F15-54, 2015 BCIPC 57 (CanLII), Order F14-10, 2001 CanLII 21561 (BC IPC), Order F08-02, 2008 CanLII 1645 (BC IPC), and Order 01-07, 2001 CanLII 21561 (BC IPC).

²¹ Applicant's response submission, para. 17.

OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

November 21, 2018

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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